

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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74-1037

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN CAPRA, LEOLUCA GUARINO and STEPHEN DELLACAVA,

Defendants-Appellants.

On Appeal from Judgment of Conviction from the United States
District Court for the Southern District of New York

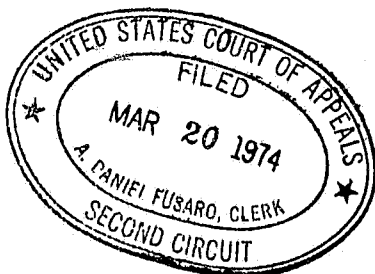
Appendix

(Vol. III - Pages 281 - 743)

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TABLE OF CONTENTS

Volume I	<i>Page</i>
Docket Entries	i
Indictment	A-1
Notice of Motion	A-10
Affidavit of Barry Ivan Slotnick In Support	A-11
Application for Severance	A-59
Affidavit of John Capra In Support	A-62
Affidavit of Patrick Guarino In Support	A-69
Petition	A-90
Affidavit of Dennis McAlevy In Support	A-92
Letter Dated December 24, 1973 from Slotnick & Narral to Hon. Marvin E. Frankel	A-96
Defendant Guarino's Memorandum of Law	A-104
Notice of Motion	A-118
Affidavit of Dennis McAlevy In Support	A-120
Affidavit of Steven Della Cava In Support	A-136
Affidavit of Leoluca Guarino In Support	A-138
Affidavit of John Capra In Support	A-139
Affidavit of Leoluca Guarino In Support	A-140
Notice of Motion	A-142

	Page
Affidavit of Steven Della Cava In Support	A-143
Affidavit of John Capra In Support	A-145
Affidavit of Leoluca Guarino In Support	A-146
Notice of Motion Dated Sept. 5, 1973	A-147
Affidavit of Dennis D.S. McAlevy	A-148
Affidavit of Barry Ivan Slotnick In Support	A-149
Affidavit of Leoluca Guarino In Support	A-150
Letter Dated Sept. 7, 1973 from Gerald A. Feffer, U.S. Attorney to Hon. Marvin E. Frankel	A-151
Memorandum of Justice Frankel Dated Oct. 16, 1973 ..	A-154
Memorandum on Pretrial Publicity	A-163
Memorandum of Justice Frankel Dated Nov. 27, 1973 ..	A-186
Memorandum of Justice Frankel Dated Dec. 27, 1973 ..	A-190
Memorandum of Justice Frankel Dated Dec. 4, 1973 ...	A-208
Memorandum of Justice Frankel Dated Oct. 15, 1973 ..	A-228
Eavesdropping Warrant Dated Dec. 8, 1971	A-230
Affidavit of Frank S. Hogan In Support	A-233
Affidavit of George Eaton In Support	A-235
Affidavit of John J. Hill In Support	A-255
Affidavit of William McCrorie In Support	A-259

	Page
Extension and Amendment of Eavesdropping Warrant Dated Jan. 6, 1972	A-260
Affidavit in Support of Frank S. Hogan	A-262
Affidavit in Support of Detective George Eaton	A-264
Volume II	
Transcript of Testimony of Pre-Trial Hearing	1
Stephen Dellacava, direct	2
cross	9
redirect	31
recross	33
John Capra, direct	34
cross	37
redirect	52
recross	53
Leoluca Guarino, direct	55
cross	60
redirect	132
recross	136
David Samuel, direct	142
cross	146
redirect	222
recross	224
George Eaton, direct	234
cross	272
redirect	275

Volume III

Bernard Gillespie, direct	281
cross	287
Michael Santangelo, direct	345
cross	360
redirect	409

	Page
Robert Allen, direct	426
cross	429
Michael A. Waniewski, direct	468
cross	472
redirect	485
recross	486
John Hill, direct	539
cross	545
redirect	695
recross	699

Volume IV

Clifford Scott Fishman, direct	744
cross	769
George Eaton	904
cross	952
redirect	1195
recross	1199

Volume V

Michael Giovannello, direct	1217
cross	1256
redirect	1264
recross	1266
Milton Julert, direct	1330
cross	1338
Albert C. Blevins, direct	1385
cross	1394
redirect	1426
recross	1427
Charles W. Sibold, direct	1433
cross	1442
redirect	1471
recross	1476

	Page
George J. Ryan, direct	1478
cross	1486
Volume VI	
Excerpts from Transcript of Testimony of Trial	
Robert E. Johnson, direct	69
cross	77
Thomas S. Kostecke, direct	107
cross	117
Joaquin Ramos, direct	140
cross	793
redirect	979
James Nauwens, direct	1031
Frank Jackson, direct	1107
cross	1210
Earl Simms, direct	1516
cross	1678
Walter Cacioli, direct	1702
Charles Mondo, direct	1713
cross	1718
Albert C. Blevins, direct	1738
cross	1740
George J. Ryan, direct	1748
Mickey DeHook, cross	1799
Joseph Morrin, direct	1812
George Eaton, direct	2164

	Page
Earl Simms, cross	1680
redirect	1686
Joseph Conforti, direct	2400
cross	2472
Harvey Tuerack, cross	2644
Fortunato DeLuca, direct	2660
Gerald Lino, direct	2746
David Samuel, direct	2769
cross	2832
Robert A. Henderson, cross	2908
direct	2886
Herbert Sperling, direct	3309
cross	3331
Robert A. Henderson, direct, rebuttal	3470

Volume VII

Summation of Mr. Feffer	3824
Charge of the Court	3898
Sentencing Minutes	1
Defendants Exhibit A — Article from The New York Times	E-1
Defendants Exhibit B — Article from the New York Post, April 16, 1973	E-9
Defendants Exhibit E — Photograph from Newspaper	E-12

	Page
Defendants Exhibit F — Article from the Daily News of April 17, 1973	E-13
Defendants Exhibit G — Photograph from Newspaper ..	E-17
Defendants Exhibit H — Photographs from Newspaper ..	E-18

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281

THE COURT: All right, gentlemen.

MR. FEFFER: Your Honor, the Government calls
Bernard Gillespie.

B E R N A R D G I L L E S P I E , called as a witness
by the Government, being first duly sworn, testified
as follows:

DIRECT EXAMINATION

BY MR. FEFFER:

Q Mr. Gillespie, by whom are you employed?

A New York City Police Department.

Q What is your position with the New York City
Police Department?

A I'm a sergeant.

Q I want to direct your attention to April 13,
1973 and April 14th, did you have an assignment on that
date with three others to arrest a John Capra for violation
of the Federal narcotic laws?

A Yes, sir, I did.

Q Do you see Mr. Capra in this courtroom?

A Yes, sir.

Q Point him out, please.

A The gentleman sitting with the vest, blue suit
and black tie.

MR. FEFFER: May the record reflect that the defendant Capra has been correctly identified.

Q Did you have with you a warrant for the arrest of John Capra?

A Yes, sir, I did.

Q Can you tell the Court where you located Mr. Capra and at approximately what time?

A At about 5.20 in the morning at his residence, 15 North Wood Circle, New Rochelle.

Q Tell the Court the circumstances leading up to the arrest of John Capra at that time.

A Approximately at 10 o'clock on the night of the 13th we had been given this assignment to locate the subject. We had checked the various locations where we knew him to frequent. He wasn't there. Eventually, we set up surveillance on his residence. About 5 o'clock we made a phone call into the house, or I had somebody at the base make a phone call to determine if he was home. A male answered the phone. We then approached the door.

Q Who was with you?

A Detective DeMarco from my unit, Special Investigating Unit, and agents Allen and Sokel from BNDD.

Q That is the Bureau of Narcotics & Dangerous

Drugs?

A Yes.

Q What took place from that point on?

A I spoke to Mrs. Capra. She answered the door. She said her husband wasn't home. I asked her if I could make a phone call. She permitted me to make a phone call, at which time I called the base and they informed me they had made a phone call, and I asked them to call the same number again. They said that perhaps we had the wrong number and made an error.

At that point I realized I had to wait until the subject came home. Mrs. Capra permitted us to wait inside the house.

Q What took place after that?

A Approximately 6 o'clock a person known to me as Mike Santangelo, a lawyer, came to the door and spoke with Mrs. Capra, and then went upstairs for a period of time.

He came downstairs and spoke with myself in the foyer of the house.

Q Prior to that did you have any conversations with Mrs. Capra --

MR. SLOTNICK: I object. I think this is hearsay, conversations with Mrs. Capra and the officer outside the presence of my client.

1
2 MR. FEFFER: I'm trying to show the state of
3 this individual's mind in locating the individual, not for
4 the truth.

5 MR. SLOTNICK: I don't understand that.

6 MR. FEFFER: It has to do with why he stayed
7 at the house until Mr. Capra eventually came.

8 THE COURT: Is there any dispute about the
9 propriety of his staying in the house?

10 MR. FEFFER: I expect there may be.

11 MR. SLOTNICK: I'm not contesting that.

12 MR. FEFFER: Fine, your Honor. Then I with-
13 draw it.

14 Q After Mr. Santangelo arrived, what took place?

15 A He had spoken with Mrs. Capra and also had
16 gone upstairs to the second floor of the house and then
17 came down and started to speak to us. I had mentioned
18 that we were interested in finding his client, who I
19 believed was his client, Mr. Capra. He said more or
20 less to give him ten more minutes.

21 Hearing this I realized he was probably up-
22 stairs, so I went upstairs, found the defendant and placed
23 him under arrest.

24 Q What took place following the arrest of Capra?

25 A I permitted him to get dressed and we went

1 rds
2 downstairs and brought him out to the car, at which point
3 I advised him of his rights.

4 Q Did you tell him in the house where you appre-
5 hended him, that he was under arrest?

6 A Yes, sir.

7 Q Did you tell him what for?

8 A Yes, sir.

9 Q What was that?

10 A What was spelled out in the warrant, violation
11 of the narcotics laws.

12 Q Did there come a time when you warned or
13 apprised Mr. Capra of various constitutional rights?

14 A Yes, sir.

15 Q And how did you do that?

16 A Well, I read from a card, which is a standard
17 card, of the specific rights that he has.

18 Q Do you have that card with you now?

19 A Yes, sir.

20 Q Can you produce that?

21 A Yes (handing).

22 That may not be the exact one. I may have
23 changed it with another one, but it is the same card.

24 (Government's Exhibit 2 was marked for
25 identification.)

xx

1
2 MR. FEFFER: Your Honor, the Government
3 offers Exhibit 2 in evidence.

4 MR. SLOTNICK: I object to its acceptance in
5 evidence. The indication is that that is not the
6 card that was read from. At most it is the same format.
7 Now, the difference in a word may be the difference
8 between a proper Miranda warning and an improper one.
9 Unless the officer is able to present the original card
10 he read off of, I would object.

11 THE COURT: What do you mean the same format?
12 Is it another copy of the same card or is it a similar
13 card with different wording?

14 THE WITNESS: It is another copy of the same
15 card. It is a standard card. It is the exact wording
16 of the original card.

17 THE COURT: Overruled.

18 (Government's Exhibit 2 was received in
19 evidence.)

20 Q After you apprised Mr. Capra of the rights
21 which you read off this card, Government's Exhibit 2,
22 what did you do with Mr. Capra?

23 A I proceeded to 555 West 57th Street, the BNDD
24 headquarters, and turned him over for processing to Agent
25 Waniewski, Mike Waniewski.

MR. FEFFER: I have no further questions.

CROSS EXAMINATION

BY MR. SLOTNICK:

Q You received the warrant at 10 p.m. on April 13th. Is that correct?

A That's correct.

Q Who did you receive the warrant from?

A From Agent Sokel, who I received it from. There was somebody handing out each individual assignment. I don't recall who.

Q Where were you when you received the warrant?

A At 555 West 57th Street, the auditorium.

Q Tell us -- in the auditorium?

A Right.

Q Tell us the facts and circumstances regarding handing out the warrant and what took place on that occasion?

A There were all the officers involved in the investigation who were gathered or assembled at the auditorium. At which time they were told their assignments and each was sent out to pick up their targets.

Q About what time did this gathering take place?

A I know I was in there at approximately, I think, 10 o'clock. I had gone out earlier because I was look-

ing for one of the principal subjects. So the gathering was ongoing from 10 o'clock to approximately 1 o'clock. I believe the majority of the investigators were told to report at 12 midnight.

Q But you indicated that you were at this auditorium on a prior occasion in order to look for another subject. Is that correct?

A Myself?

Q Yes.

A On a prior occasion on the same evening?

Q That's correct.

A No, sir. My prime subject was John Capra. That was the only one.

Q So the first time you appeared at this auditorium at West 57th Street, which was at the time the headquarters of the BNDD. Is that correct?

A Yes.

Q Was at 10 p.m. on the evening of April 13th?

A In connection with this assignment, yes.

Q The first time you appeared at the auditorium at West 57th Street on April 13th was at 10 p.m. Is that correct?

A That's correct.

Q Were you at that auditorium on April 13th at

any earlier time?

A No, sir.

Q You are sure of that?

A I'm sure.

Q Now, when you appeared at 10 p.m. what did you observe?

A I observed a congregation of fellow officers and investigators.

Q And that there was a meeting already in progress. Is that correct?

A Yes.

Q And do you know who was addressing the meeting?

A There was -- I believe Commissioner McCarthy was speaking at the meeting. I believe I seen the head of the Narcotics Division, and several others. I believe Mr. Pohl was there and maybe one or two of the directors of BNDD, which I didn't know by names.

Q And was there a stage?

A Yes.

Q Were there people on the stage?

A Yes, sir.

Q And there were people speaking. Is that correct?

A That's correct.

Q And did Chief Inspector McCarthy make a speech?

A I believe he did.

Q Do you recollect or do you remember what he said?

A I wasn't present for the speech. I was outside in the hall.

Q Do you know what time he began to speak?

A No, sir.

Q Could you estimate it?

A Some time between 10 and midnight.

Q And the head of the Narcotics Division, do you remember whether he addressed the group?

A No, I don't. I just remember he was there.

Q Do you know what time this auditorium meeting commenced on the evening of April 13th?

A No, I don't.

Q And when you arrived at 10 p.m. where were you coming from?

A From a plant in Whitestone.

Q And who did you arrive with?

A I believe I came by myself.

Q And who were scheduled to meet?

A At that point?

1
2 Q At that point.

3 A At Queens to meet a fellow investigator or
4 investigators and to go to 57th Street, at which point
5 I would be given my assignment.

6 Q What time was the meeting in Whitestone?

7 A I believe approximately 9.30 we were going to
8 meet there and then travel as a group over to 57th Street.

9 Q And you knew at that time there was to be a
10 mass arrest held of some 80 some-odd people. Is that
11 correct?

12 A No, sir, I didn't know. But I had my ideas
13 about it.

14 Q When did you first arrive with the idea that
15 you were to make arrests on April 13th, 1973?

16 A Maybe a week or two before.

17 Q In other words, will you tell us how you
18 got that idea?

19 A I could see a culmination in the investigation
20 that had been going on for a long period of time.

21 Q When you say culmination, what does that mean?

22 A That it was going to come to an end, that the
23 subjects would be arrested.

24 Q So you viewed in your own mind that it was in
25 the next two weeks or so that you would eventually, or

other officers together with Federal agents, would eventually make arrests. Is that correct?

A Right.

Q During the course of the investigation prior to this two-week period you spoke to Mr. Feld and Mr. Feffer?

A No, sir.

Q Who were the Federal authorities that you met with?

A BNDD supervisors.

Q That would be whom?

A Ross Reilly, Mr. Pohl, individuals of that supervisory capacity.

Q So at 10 p.m. you received a warrant from an agent by the name of Sokel. Is that correct?

A I believe it was Mr. Sokel.

Q What happened after that?

A We had gone out into the street to find Mr. Capra.

Q When you say "we," who is "we"?

A I believe Detective DeMarco was with myself and we went out looking for John Capra.

Q So it was just you and Detective DeMarco that left the auditorium at West 57th Street. Is that

correct?

A No, sir. There was other people there.

Q That left together, who were the other people that left with you?

A Let's see, I had a Deputy Commissioner of Public Relations, Mr. Kellerman, and Mr. Kirkman from the Daily News.

Q They left with you for the purpose of arresting Mr. Capra. Is that correct?

A I don't know what their purpose was for being with me, but they were observers.

Q Did you ask the man from the Daily News what he was doing there?

A No.

Q Did anybody explain to you what the man from the Daily News was doing there?

A No. The head of the Narcotics Division told me that Mr. Kellerman and Mr. Kirkman would be along for the arrest.

Q Now, is Mr. Kellerman a police officer to your knowledge?

A No, sir.

Q He is the Director of Public Relations?

A Yes.

Q That is like a publicity man, am I correct?

A A civilian who is a Deputy Commissioner in the Police Department.

Q His job is to run the publicity for the New York City Police Department. Is that correct?

A Yes.

Q Did this man from the Daily News carry a camera with him?

A No, sir.

Q Now, the four of you left garnered with a warrant for defendant Capra at that time. Is that correct?

A That's correct.

Q And you looked for defendant Capra on the isle of Manhattan. Is that correct?

A That's correct.

Q And did you go to the Bronx?

A Yes.

Q And finally you arrived at Westchester?

A Right.

Q Downstate Westchester?

A New Rochelle.

Q Now, you were staked out outside of defendant Capra's home for how long a period of time?

A Myself -- eventually we got there in the early

hours of approximately 1 o'clock in the morning, and seeing that he wasn't there, there was no activity in the house, decided to return back to the Bronx locations where I may find him, where I thought I could find him.

I surveyed those areas until about 3 a.m. and returned maybe 3.30 in the morning to the residence.

Q When you say there were no activities there, you observed a dark house, lights out?

A Lights had been on on the first floor, and on my return lights were out on the first floor.

Q So it appeared to you as if people were sleeping, which is not unusual at that hour?

A Correct.

Q Up until this period of time were you still with the publicity man and the Daily News reporter?

A Yes, sir.

Q Had you had any conversations with them about what was to take place?

A Yes, sir.

Q Did you tell them you had a warrant for John Capra?

A Yes, sir.

Q Did you tell them -- withdrawn.

Did they tell you anything about their assign-

ments?

A No, sir.

Q Did you know what the Daily News reporter was doing there with you?

A I would assume he was there to cover a story, potential story'

Q A story which you would aid and assist him in gathering. Is that correct?

A No, sir.

Q Was he driving around in a separate car?

A No, sir.

Q He was driving in your car?

A In the automobile, yes, sir.

Q Who was driving the automobile?

A I believe Agent DeMarco was driving the automobile -- Detective DeMarco.

Q And the publicity man and the Daily News reporter were driving in the automobile with you. Is that correct?

A They were passengers in the automobile.

Q So, again, I ask the question, you were aiding him in his obtaining the story for the Daily News?

A Yes.

Q Now, you returned back to the Capra residence

about what time?

A About 3.30 in the morning, I believe.

Q Again you are still with the same group of four individuals?

A Right.

Q And when did the agents from BNDD appear on the scene?

A They originally had started out in another automobile and had accompanied us and had remained at the location from about 1 o'clock when we got up there, or whatever time it was in the morning. I told them to maintain surveillance there while the people in my automobile went back to Manhattan and the Bronx to look around.

Q By the way, this is Agents Allen and Sokel. Is that correct?

A Yes, sir.

Q When you say they accompanied you, there were then six people in your car?

A No. As I said, they had a separate automobile.

Q So they parked in front of Capra's residence. Is that correct?

A No. They took up a position where they could see the Capra residence.

Q Somewhere in North Wood Circle, that area?

A I believe it was in the parking lot of Eron Prep School.

Q Adjacent to North Wood Circle. Were you in radio communication with them?

A Yes, sir.

Q What time did you leave them at North Wood Circle?

A Approximately --

Q The first time?

A 1 a.m. or a short time after.

Q Did you have a conversation with them as to what the operating procedure would be had Mr. Capra arrived at his home during that period of time?

A They were to notify us and we would respond.

Q Were they to arrest Mr. Capra without your presence?

A It was understood that it was a joint operation, so it would be best if both City and Federal people be

Q Including the New York Daily News?

A Yes, sir. Well, they are with us, so they're there.

Q And the publicity man?

A Yes.

1 Q By the way, by about 1 o'clock did anybody
2
3 appear with a camera?

4 A Persons had been present with a camera in their
5 automobile.

6 Q Who were these persons?

7 A I believe one was a writer for the New York
8 Magazine by the name of Tom Blake, and the other gentleman
9 was perhaps a photographer for the Times.

10 Q For the New York Times?

11 A Yes.

12 Q Do you happen to know how they got there?

13 A I believe they were also assigned by superior
14 officers in my department.

15 Q When you say "assigned," they are not New York
16 City policemen, are they?

17 A No, sir.

18 Q So actually your superior officers have no
19 right of assignment over them. Is that correct?

20 A Correct. I would say the officers were
21 assigned these individuals.

22 Q As a matter of fact, you saw in your own eyes
23 there was to be a great amount of publicity surrounding
24 the arrest of John Capra. Is that correct?

25 MR. FEFFER: Objection, your Honor. Counsel

has had somewhat close to five months to make a motion based on pretrial publicity. He has failed to do so. I don't see the relevance of cameras and newsmen. The direct testimony of this individual is as to what took place inside the Capra home, the rights.

MR. SLOTNICK: I think it is rather relevant for the simple reason that, No. 1, counsel has not been aware of any post-arrest statements until last week.

No. 2, counsel was aware of the fact that Mr. Capra was informed that the cameraman that took a picture of Mr. Capra was a member of BNDD and he was so informed by one of the agents that made the arrest. This publicity man, the Daily News, New York Magazine is all a great surprise to counsel. Counsel has seen the pictures --

THE COURT: Are you prepared to make an affidavit to the effect of the statement you just made when I have been, as an innocent bystander and an ignorant newspaper and magazine reader, cognizant of this potential question for six months?

MR. SLOTNICK: I'm prepared to say the following. your Honor:

I was given the following information -

THE COURT: I'm not asking you that. I'm

1 asking you whether you are prepared to say that you, just
2 now, or within the last week or month, became aware of
3 a possible issue in this case arising from the participa-
4 tion of journalists, both reporters and cameramen and
5 others, in the mass arrests about which we have heard
6 today?
7

8 MR. SLOTNICK: I'm aware the issue existed and
9 I never raised the issue.

10 THE COURT: You never raised it?

11 MR. SLOTNICK: That's correct.

12 THE COURT: But you are aware that it was
13 available?

14 MR. SLOTNICK: I felt that issue could properly
15 be reserved until we picked the jury. If the jury was
16 so infected by that publicity, we would be unable to pick
17 a jury and your Honor would use his discretion in giving
18 us a continuance.

19 THE COURT: However you raised it, I just
20 wanted to clear the air on that.

21 How is the question about who owned or employed
22 this cameraman relevant to any issue on the motion you
23 made orally with respect to which I am now affording you
24 and your client a hearing?

25 MR. SLOTNICK: It has relation to what I would

1
2 call the bona fides surrounding the arrest. One of the
3 issues -- and during the lunch hour I was privy to my
4 secretary in the courtroom and I dictated the papers to
5 be submitted to your Honor for tomorrow -- and one of the
6 issues that I indicated in my moving papers was the fact
7 that there was some strangeness about this arrest, the
8 fact that if a judicial officer had been provided Mr.
9 Capra may not have made that statement. And I am now
10 discussing on cross-examination the entire bona fides of
11 this arrest, of this hour, of this time, of this occasion.

12 THE COURT: Are you suggesting that these
13 police officers could have arrested Mr. Capra somewhere
14 else earlier and in bad faith arrested him at his house
15 at the time when he was arrested. Is that what you are
16 suggesting?

17 MR. SLOTNICK: I'm suggesting from this
18 officer's testimony I don't find that. That's what I'm
19 suggesting.

20 THE COURT: Is that your offer of proof?

21 MR. SLOTNICK: It is not, your Honor.

22 THE COURT: I don't understand you then
23 because Mr. Santangelo has been mentioned and obviously
24 he can shed some light on this, and so could Mrs. Capra.

25 What do you mean? And if you want to do it

out of the hearing of the witness, I'll allow you to do it.

MR. SLOTNICK: If I may.

THE COURT: I would like to hear what you mean.

(At the side bar.)

THE COURT: What do you mean by questioning the good faith of this arrest under a warrant issued out of this court?

MR. SLOTNICK: I have always been concerned about the fact that there was great publicity attendant, although I have not raised it yet and may never raise it, attendant to this arrest and mass arrests. My concern is as to one of Mr. Capra's rights, which was to be arrested without this type of publicity. Again as I indicate to your Honor, I have not raised that issue. However, I am very concerned about the fact that there was a New York Magazine, a New York Times man, a Daily News man, various other people from the media brought there by the Police Department.

I think that they have exceeded the bounds of propriety.

THE COURT: In relation to his rights, I have questions about the propriety of this arrest, too. But the last time I read Miranda, which is what this motion is about --

1
2 MR. SLOTNICK: To a certain extent, yes.

3 THE COURT: No, only to that. That's all it
4 is about. That's all I granted you a hearing about, as I
5 understood it. Maybe you ought to make a crisper oral
6 motion on that.

7 MR. SLOTNICK: I'm requesting that the state-
8 ment of the defendant Capra be suppressed in view of the
9 fact that his Miranda rights were violated, in view of the
10 fact that there was an attorney at his home at 6 o'clock
11 in the morning, who I hope the proof will show indicated to
12 Mr. Capra and the arresting agents that statements were
13 not to be given, made or taken. I further indicate to
14 the Court at this time, as I attempted to do there in a
15 rather awkward fashion, that the issue brought out through
16 Mr. Feitell's questioning of the officer this morning
17 about the fact that there was no proper judicial officer
18 the next morning would have cut off the possibility of
19 Mr. Capra's statement. I don't know when the statement
20 was made. I don't have that information.

21 THE COURT: Look, I'm asking you what all the
22 photographers have to do with this, and you have not
23 answered that yet. That is what the objection is about.

24 MR. SLOTNICK: As has been suggested by other
25 counsel, there is an issue at this point now of harassment,

1
2 provocation, the propriety of the arrest. The police
3 brought these people there.

4 THE COURT: I know who brought them. You say
5 this is a Miranda question. As I read Miranda, in the
6 dank cellar with a light shining in your eyes, bereft
7 of access to the outside world, beaten, abused you confess
8 because your will is underborne or there is a danger of
9 that. It seems to me if I were worried about Miranda
10 warnings, nothing would please me more than to have a
11 fleet of Life and Time photographers around to take
12 pictures of this abuse so that I could preserve my rights.
13 That's why I think this is all rather irrelevant. It may
14 go to something else some other time.

15 I think the Government ought to stipulate, so
16 we can cut through this, that there were photographers;
17 that they took pictures of Mr. Capra; and I've seen then
18 myself, if you want to make an issue of that; and you
19 have known about them for six months and you should have
20 put something in your papers so that this novelty that
21 you suddenly suggest at 4.30 in the afternoon could have
22 been dealt with perhaps on paper instead of on this hearing
23 where it suddenly becomes an incident that nobody should
24 have expected or that we shouldn't be taking time with.

25 Why don't you stipulate, Mr. Feffer, there were

1
2 photographers along with the police, that they took
3 pictures of Mr. Capra. I recollect he was coming out
4 of a closet. Is there anything like that?

5 MR. SLOTNICK: No.

6 THE COURT: Whatever it was, there was a blaze
7 of publicity attending his arrest and a lot of people.
8 Isn't that what you want to show?

9 MR. SLOTNICK: Yes. I would also like to
10 find out, because again the novelty of the issue is not
11 the publicity issue but the propriety of the police and
12 agents exhibiting this type of conduct. Somewhere in the
13 back of my mind it suggests to me that there is some sort
14 of violation of his rights to have this thing occur.

15 I never, in my wildest dreams, and I say this
16 in good faith before the Court, believed that the police
17 would ferret around with them photographers from the Daily
18 News taking pictures of an arrest. I don't know where
19 they were stationed. I know there was a photographer
20 outside his home. As he walked out a picture was taken
21 and he was told that that's an agent.

22 THE COURT: My point is, as an administrator of
23 this proceeding who is beset with about 40 motions, will
24 instruct you now that I'm not going to let you pursue a
25 line of questioning every time something makes an appear-

1 ance in the back of your mind. Your statement just now
2 persuades me that this is ended for now. If you later
3 have a point, a motion, a contention that gets to the front
4 of your mind and can be formulated in terms of law, I'll
5 hear it. But on the Miranda question and the related
6 question of right to counsel that you mentioned in respect
7 of Mr. Santangelo, under whatever case that arises, I'm
8 not going to hear it.
9

10 MR. SLOTNICK: On that basis, as your Honor
11 indicated, when I can present proper papers, I will leave
12 the issue at this point.

13 THE COURT: I say it is a separate question
14 which I have not given attention up to today and on which
15 nobody intended to accord you a hearing today. I'm not
16 going to give you a new hearing, expanded hearing every
17 time you get an idea. You are going to have to limit
18 yourself to the issues and the proceedings that we are
19 conducting in this case or you are not going to have another
20 case, neither will I.

21 MR. SLOTNICK: The Government is stipulating
22 there was a blaze of publicity which was caused by the
23 police in notifying and carrying reporters with them?

24 THE COURT: I don't know about the word
25 "caused," but "aided" or "cooperated".

Is that stipulated to?

MR. PEPPER: It is stipulated at the time of Capra's arrest there were newsmen present, photographers were there, pictures taken, and there was a blaze of publicity surrounding his arrest.

MR. SLOTNICK: Again, your Honor, not getting into another area, it may fortify learned Counsel Feitell's issue as to whether the credibility of --

THE COURT: That is all lovely. If each of you fortifies each other and you dispose of the proceeding in my absence, that's fine. If I'm going to hear you one at a time I have to know what the question is before I can begin to seek an answer. Let Mr. Feitell fortify himself.

Now you have a stipulation and you understand the situation and we will now proceed with the hearing that you are supposed to be conducting.

MR. SLOTNICK: May I ask the Government whether they knew whether any of the news media people were in the house of Capra?

MR. PEPPER: I don't know myself. I don't see any relevancy.

MR. SLOTNICK: Why don't you ask the police officer that?

MR. FEFFER: He is your witness.

THE COURT: You can ask him.

(In open court.)

BY MR. SLOTNICK:

Q Sergeant Gillespie, at any time during your appearance in the Capra household on April 13th or 14th of 1973, were any news media people or public relations people in the Capra household?

A Yes, sir.

Q Did you bring them in?

A No, sir.

Q Do you know who brought them in?

MR. FEFFER: Objection, your Honor.

MR. SLOTNICK: I will end with this question, your Honor.

THE COURT: All right, I'll allow it then.

Q Do you know who brought them in?

A No, sir.

Q You entered the Capra household at approximately what time?

A I believe about 5.20.

Q About 5.20 and you encountered Mrs. Capra. Is that correct?

A That's correct.

Q And about what time -- withdrawn.

Who was in the Capra household at the time that you entered that you knew about and that you could visibly see?

A I could only see Mrs. Capra.

Q You had brother officers with you, didn't you?

A Yes, sir.

Q Who else was in the household that you could visibly see?

A When I entered?

Q Yes.

A The only person who answered the door was Mrs. Capra.

Q You entered alone?

A She answered the door and then I answered. Fellow officers entered with me. I believe it's Detective DeMarco, Agent Sokel, and Agent Allen, and Mr. Kellerman and Mr. Kirkman may have been present at that time.

Q So you all entered together?

A Yes.

Q And where did you go in the Capra household?

A I spoke to Mrs. Capra in the foyer.

Q And then where did you go?

A I went upstairs to check to see if her husband

was upstairs with Mrs. Capra. She told me --

Q Where did you go then?

A I returned downstairs.

Q And the mass of officers and other individuals were still in the household. Is that correct?

A I believe so. At that point I decided we are going to have to stay there. Someone is going to have to take up surveillance outside the premises and someone to stay in the premises.

Q Who took surveillance outside the premises?

A I believe everyone except myself, Mr. Kellerman and Mr. Kirkman, who remained in the premises. Everyone else was outside.

Q And there came a time when a new face appeared on the scene. Is that correct?

A That's correct.

Q About what time was that?

A Approximately 6 o'clock.

Q And who did that face belong to?

A Michael Santangelo.

Q Did you have a conversation -- did you know who he was?

A Yes.

Q When he entered the house?

1
2 A Yes.

3 Q How did you know who he was?

4 A I knew him from seeing him in the court area
5 and also from other officers pointing him out to me.

6 Q There was no question at all in your mind when
7 he walked in that he was an attorney?

8 A That's correct.

9 Q When did you first learn he was an attorney
10 who represented Mr. Capra?

11 A I assumed he represented Mr. Capra. I didn't
12 learn it.

13 When did I learn it? A long time ago, that
14 he generally represents Mr. Capra and other people.

15 Q Prior to this arrest?

16 A Right.

17 Q Now, what was the first conversation you had
18 with Mr. Santangelo as you can remember, and tell us what
19 time it was and who was present?

20 A Approximately 6 o'clock Mr. Santangelo came.
21 He asked -- I identified myself and told him I had an
22 arrest warrant for Mr. Capra. He says more or less to
23 the effect that he was somewhat aware of it because he had
24 spoken to Mrs. Guarino over the telephone, who had then
25 informed him that agents were at Mr. Guarino's house and

1 apparently took him into custody. I don't know what
2 his assumptions were, but he responded to the Capra
3 residence.
4

5 Q So therefore he indicated to you that he was
6 there acting as Mr. Capra's attorney?

7 A More or less, yes.

8 Q Did Mrs. Capra give you an indication that he
9 was telling the truth?

10 A They engaged in a conversation out of my
11 hearing.

12 Q So it is your fair and reasonable belief at
13 that time that he was acting as Mr. Capra's attorney?

14 A Yes.

15 Q And who else was present? Mr. Santangelo,
16 Mrs. Capra, yourself?

17 A Right.

18 Q The publicity man and the New York Daily News
19 man?

20 A Right.

21 Q Now, when was the next time you had a con-
22 versation with Mr. Santangelo?

23 A He had gone upstairs with Mrs. Capra, I guess
24 to speak with her. I assumed something else. Then he
25 returned downstairs and we were talking in the kitchen

area.

Q When you say "we," who is "we" now?

A Myself and Mr. Santangelo.

Q During this period of time no one else entered or left the house?

A That's correct.

Q What was the conversation you had with Mr. Santangelo?

A I just mentioned that he had gotten wakened out of his sleep, or something to that effect, and he hurried over. Other points of the conversation I don't recall.

Q Did you have coffee?

A No, I didn't. It was offered to us but I didn't partake. I believe Mr. Santangelo did.

Q Had coffee, all right. Then you had another conversation with Mr. Santangelo in which he said, "If you wait ten minutes my client will appear"?

A Yes. I said it would behoove him to contact his client because it could be all resolved.

Q What was his response?

A He said more or less to give him ten more minutes. Then I heard some noise upstairs. I assumed that the client was upstairs, and I went upstairs and he

1
2 was there.

3 Q And there was Mr. Capra?

4 A Right.

5 Q What did you do when you first saw Mr. Capra?

6 A I informed him that he was under arrest.

7 Q Did you show him an arrest warrant?

8 A I believe so.

9 Q Did you have a copy of the arrest warrant with
10 you?

11 A Yes.

12 MR. SLOTNICK: May we, your Honor, for the
13 purpose of a defense exhibit -- the Government is handing
14 to me a copy of the arrest warrant and I would like to
15 place it in evidence, your Honor.

16 (Defendants' Exhibit C was received in
17 evidence.)

18 Q I show you Defendants' Exhibit C received in
19 evidence and ask you whether to your recollection that is
20 a fair and adequate representation of what you showed
21 Mr. Capra and what you had in hand that evening.

22 A Yes.

23 MR. SLOTNICK: I'll return it to the Govern-
24 ment for their safekeeping (handing).

25 MR. FELD: Thank you.

1
2 Q Did you have a conversation with Mr. Capra
3 at that time?

4 A No, sir.

5 Q You told him to get dressed?

6 A Yes, sir.

7 Q Other than get dressed, you said "Let's go"?

8 A Yes.

9 Q What else?

10 A That's about all.

11 Q After he got dressed you left the bedroom in
12 the upper wing and went downstairs. Is that correct?

13 A That's correct.

14 Q When you went downstairs who was present?

15 A I believe Mr. Kellerman, Mr. Kirkman, I believe
16 Mr. Santangelo had come upstairs, followed me up more or
17 less a couple of seconds later, and he also descended
18 downstairs.

19 Q So he was upstairs while Mr. Capra was getting
20 dressed?

21 A During part of the time, yes.

22 Q Do you recollect Mr. Santangelo telling Mr.
23 Capra that he wasn't to make any statements until later on?

24 A Walking down the stairs they were in conversa-
25 tion.

Q They were in conversation?

A A whispered conversation.

Q You imagine that would be attorney-client talk. Is that correct?

A Yes.

Q You didn't bother to listen in?

A No, sir.

Q Do you remember Mr. Santangelo at that time telling you police, "Don't ask my client any questions other than his name and address"?

A No, sir.

Q Do you remember when he first said that to you?

A I don't believe he said that to me.

Q Now, while you were upstairs with Mr. Capra while he was getting dressed, what conversation did you have with Mr. Santangelo?

A I don't recall any conversation upstairs. When we were downstairs he asked me where his client would be and I told him I was bringing him to BNDD headquarters.

Q Which was where?

A 555 West 57th Street.

Q What time was this?

A When we were leaving, approximately 6.30.

1
2 Q By the way, Agents Allen and Sokel, had they
3 entered the house yet?

4 A Not to my knowledge. I know they were still
5 outside. I know Detective DeMarco was because when we
6 brought the defendant out, they handcuffed him.

7 Q So you took Mr. Capra out of the house and what
8 was the last conversations you had with anybody in the
9 house? Was that the Santangelo conversation?

10 A Yes.

11 Q In other words, he said, "Where will my client
12 be?" and you said, "555 West 57th Street"?

13 A I don't know if it was in the house or after
14 we had gotten in the vehicle.

15 Q Did Mr. Santangelo leave the house with you?

16 A I don't know. I believe at the time he was
17 outside with us. He left with us or maybe he spoke to
18 Mrs. Capra.

19 Q When you say he left the house, you mean
20 walked from the inner door to the outside front lawn area?

21 A I don't remember.

22 Q Do you remember him walking to the car where
23 Mr. Capra was seated handcuffed and saying something to
24 him or saying something to another agent?

25 A He was standing outside the vehicle while I

1 was reading Mr. Capra his rights. Mr. Capra was seated
2 in the back seat with myself and I was reading him his
3 rights from that card. I believe Mr. Santangelo was
4 outside and it may have been at that point where he asked
5 where were we going.
6

7 Q Were you in the vehicle with Capra at that
8 time?

9 A Yes.

10 Q After you finished, Mr. Santangelo said,
11 "Where will my client be?"

12 A Yes.

13 Q Then you took off?

14 A Yes.

15 Q Who was in the automobile with you when you
16 left?

17 A Detective DeMarco was driving, Mr. Kirkman,
18 myself, and Mr. Capra, four people.

19 Q The Daily News man was in the automobile while
20 you left with Capra in custody?

21 A Yes.

22 MR. SLOTNICK: Your Honor, I think we need
23 another side bar because I'm about to or I would like to
24 get into that area.

25 THE COURT: Well, it is 4.40.

Sergeant, you are excused. We will have to ask you to come back at 10 a.m.

You may all come up to side bar.

(At the side bar.)

MR. SLOTNICK: Your Honor, I would like to go into the area of why Mr. Kirkman was sitting in the automobile, the possible fact that Mr. Capra would make a statement or perhaps statements would be taken from Mr. Capra by a civilian newspaperman. I find it totally unbelievable why he would be in the automobile for any reason other than obtaining the story.

THE COURT: Whatever his purpose may have been, is the Government going to introduce any statement made in the automobile?

MR. FEPPER: Absolutely not, your Honor. The only statement was one that was made later.

MR. SLOTNICK: I'm saying that it flows, it shows a motivation, it shows an intent, a purpose. Certainly one can gather, or I can gather two things from his presence.

THE COURT: You have made your offer of proof. It shows a purpose to violate his Miranda rights and have a newspaper reporter present to see the violation. This is a Miranda hearing and not some other hearing.

1
2 If I have said anything that makes it appear
3 that this Court, from where I sit, approves of having
4 Daily News photographers running around in police cars
5 and participating in arrests, that would be an erroneous
6 inference from what I intend to be saying. I am saying
7 I cannot embrace the whole universe in any given proceed-
8 ing in this case, and I'm giving you what I call a
9 Miranda hearing.

10 You make an offer of proof of having a news-
11 paperman in the car showed a purpose to violate his
12 Miranda rights and I'll let the Court of Appeals look at
13 that. Because I reject that. I don't want to go into
14 that.

15 MR. SLOTNICK: I understand your Honor's
16 logic, and we can look at the proposition from two points
17 of view.

18 THE COURT: If you ask the police officer why
19 did they have the reporter there, he will say his instruc-
20 tions were to have a PR man and a newspaper reporter there.
21 I'm not going to waste any more time on that, or this
22 trial may not get started. I know all of you wish to
23 get the trial started, but sometimes we act like we want
24 to postpone it. I don't want to. You may have
25 your hearing on the admissibility of the statement or mis-
statements, whatever they may be, and I'm going to try to

confine it to the dimensions I deem reasonable.

I don't think the presence of a newspaperman is germane beyond what you have just said, and I will take that into account, but you are just going to waste time asking this fellow what the newspaperman was doing there. He has already told you. He was instructed to have him tag along. Whether he should have been so instructed we may all have doubts about, but I don't think it relates to this hearing.

MR. SLOTNICK: Again I hope your Honor understands my logic. I understand your Honor's, that why would they bring a witness around to show his Miranda rights were being violated, and I say this was a subtle way to extract statements from the defendant Capra.

THE COURT: It is clear under Nibbs (phonetic). If the newspaperman was present when the statement was made, I'll let you bring that out.

MR. FEFFER: No, he wasn't. Other defendants and Michael Wanievski. He was in the Bureau of Narcotics in a cell at the time.

THE COURT: I just think that we have to put reasonable limits on this kind of hearing, and I hope this one is reasonable. Anyhow, I'm putting it.

10 a.m., gentlemen. I don't know who has

1 rds

323

2 been late every day, but we have been late every day.

3 I would like to get started on time tomorrow.

4 MR. STONE: Will it also affect the attorneys
5 that are not concerned with this particular hearing that
6 have made separate arrangements for coverage?

7 THE COURT: Then you are covered, but I
8 particularly want the defendants to be here on time and
9 counsel who are at bat at any given moment to be here on
10 time.

11 MR. LEVENSON: May I advise the Court that
12 with the Court's permission, if I am late I certainly
13 would not object to your starting without me. I was
14 late this morning by five minutes, ten minutes. I don't
15 want to delay anything. I'm certainly not involved in
16 this proceeding. I am here to get a little flavor of
17 the atmosphere. I don't want to hold up the Court's
18 day. So I'll advise the Court officer of that.

19 MR. STONE: I told Mr. Levenson I would cover
20 at a particular time, Friday, in exchange for times I may
21 miss. We don't want to overburden the Government's
22 financial resources in keeping us both here when we are
23 not needed.

24 MR. SLOTNICK: I'm here early, your Honor,
25 except I'm still looking for that 35-minute route and it

1 rds

2 is an impossibility.

3 THE COURT: I'm still looking for a map which
4 embraces Scarsdale and Larchmont as being upstate New
5 York. I may be able to get some extra pay out of
6 that.

7 I want the record to show, on or off, that I
8 let you get in about the downstate New Rochelle business
9 and I didn't whisper a word, so you have scored for today.
10 Tomorrow may be different.

11 MR. SLOTNICK: I'm sure of that.

12 (In open court.)

13 THE COURT: Court is adjourned.

14 (Adjourned to September 19, 1973, at
15 10.00 o'clock a.m.)
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UNITED STATES OF AMERICA

vs

73 Cr 460

JOHN CAPRA et al.,

Defendants.

New York, N. Y.

September 19, 1973 - 10:00 a.m.

(Hearing continued:)

THE COURT: Are we ready to proceed?

MR. FEFFER: Your Honor, there is one matter I want to bring to the Court's attention.

Just so the record is clear with respect to the suitcase, Government's Exhibit 1, the Government alleges that particular suitcase is in fact the suitcase that was found in Toldeo, Ohio and searched and seized at that point. It does not concede it was the same suitcase that necessarily left New York City.

Is that clear, your Honor?

THE COURT: Well, it is clear to me what you are saying now. I had asked you at the close of the session yesterday whether there was any contention as a matter of factual argument that there is a difference between the suitcase you have now put in evidence and the description given by Mr. Della Cava of the suitcase he claimed to have purchased. I

1 FDP 2

2 think you said no.

3 MR. FEFFER: That is correct. I just wanted to
4 make sure that the inference did not go further to suggest
5 that the Government did not suggest --

6 THE COURT: I understand what you are saying, but
7 the triers of fact sometimes make leaps or inferences.

8 On the record before me, it seems to me that I
9 might wind up inferring that the suitcase that was searched
10 is the suitcase that Mr. Della Cava bought. I am not saying
11 I will infer that, but, frankly, my quick impression of the
12 evidence is that that is a very possible inference.

13 Is it your intention to argue against that infer-
14 ence?

15 MR. FEFFER: Yes; we will.

16 THE COURT: Based on the record that is before me?

17 MR. FEFFER: Based on the record that is before you,
18 your Honor.

19 THE COURT: Is it the good faith or belief of the
20 Government's lawyers that the suitcase that Mr. Della Cava
21 bought is not the one that turned up in Toledo?

22 MR. FEFFER: No, your Honor. The argument would
23 be that the defendants have failed to establish, based on the
24 evidence before you, the suitcase that was given allegedly to
25 Ramos was the same suitcase that ended up in Toledo.

1 RDP 3

2 The defendant, as your Honor well knows, failed to
3 call John Ramos to the stand. He was the individual who last
4 had in his possession, according to the testimony of Della
5 Cava, the suitcase in question.

6 THE COURT: Well, if that is what you are relying
7 on, there is an arguable possibility that you can have that
8 heroin suppressed, because Ramos, I gather, is available.

9 MR. FEFFER: That is correct, your Honor. He is
10 available to the defendants.

11 THE COURT: I understand that, but I don't think
12 they have to call every hostile witness they could conceivably
13 call.

14 MR. FEFFER: That is not our point on that, your
15 Honor. Our contention is that the defendants have to estab-
16 lish that the suitcase that did end up in Toledo, Ohio, was
17 the suitcase that allegedly belonged to them or that they
18 claimed belonged to them.

19 It seems to me that in failing to call a witness to
20 the stand that they allege had in his possession the suitcase
21 and was responsible for bringing that suitcase to the ultimate
22 destination is a matter for the Court to consider.

23 THE COURT: I understand that, but let us not leave
24 it there, because my question to you now is, from time to time,
25 like a jury, a judge, as the trier of the facts, is supposed

1 RDP 4

2 to figure out the truth. My question to you now is: where
3 do you assert the truth lies? Did Ramos switch suitcases some-
4 where between the time he got the one from Della Cava and the
5 time the search was made in Toledo? And, if so, why don't
6 you prove it? Why should I be left to speculate about that?
7 There is enough here without piling inferences on inferences
8 to suggest that these men who come here and testify that
9 they were engaged in this big narcotics transaction -- that
10 they used a suitcase for it and that they packed the narcot-
11 ics in the suitcase and had it entrusted to somebody who was
12 to get it to Toledo -- have shown that the suitcase which
13 turned up in Toledo with a lot of narcotics in it is the one
14 they are talking about.

15 Unless you show me there are lots of suitcases in
16 Toledo with six or seven kilos of narcotics in them or that
17 lots of people were leaving suitcases or that Ramos was a
18 man who liked to switch suitcases or something of that kind,
19 you are liable to find me inferring, because I know no alterna-
20 tive -- that we are talking about the very suitcase that
21 Della Cava bought.

22 Then you may have to enlighten me about whether
23 in a context like this, where a suitcase is used to wrap
24 heroin and for no other purpose and where nobody could care
25 less about the suitcase as a suitcase but where everybody is

1 RDP 5

2 interested only in heroin, which is contraband, you will
3 have to enlighten me as to whether the Uniform Commercial
4 Code and the details of the law about the passage of title
5 and the risk of loss should apply in this context.

6 And I enlighten you to this extent and in this tone
7 of voice to convey the belief that the law might seem quaint
8 to someone less learned than we are if it turns out that those
9 oddities of title and of commercial risk in a narcotics deal
10 really importantly influence the sacred privileges of the
11 Fourth Amendment. That I am supposed to care about. But you
12 can brief all that.

13 MR. FEFFER: Fine, your Honor.

14 MR. FEITELL: I have an application with respect
15 to a small piece of left-over business from yesterday.

16 Della Cava's suppression hearing, where I made
17 application for the lab report concerning traces, which was
18 now turned over to me, and I have it here, and I would like
19 to offer it in evidence, specifically with respect to the
20 portion of it which belongs in the designation that the lab
21 report was as a result of the seizure.

22 Presumably, the information that a seizure was
23 involved was communicated by Agent Samuel, and that would have
24 some bearing on my contention as to whether or not we had an
25 incidental search or an inventory procedure that was followed.

1 RDP 6

2 THE COURT: Any objections?

3 MR. FELD: Only except as to the extent of limiting
4 the offering of one part of the document. I would offer the
5 entire lab report.

6 THE COURT: I assume I can look at any part of it.

7 MR. FEITELL: I have no objection to it. I am
8 concerned --

9 THE COURT: I heard what you are concerned about.

10 (Defendants' Exhibit D received in evidence.)

11 THE COURT: Are we ready to proceed now?

12 MR. SLOTNICK: If I may, your Honor.

13 BERNARD GILLESPIE, resumed:

14 CROSS-EXAMINATION (Continued)

15 BY MR. SLOTNICK:

16 Q I believe we left you with the defendant Capra in
17 an automobile; is that correct?

18 A That is correct.

19 Q You stated you went into an automobile with the
20 defendant Capra; is that correct?

21 A That is correct.

22 Q Which automobile and which vehicle was this?

23 A I believe it was a rented automobile that we had
24 used during the case. I believe it was a '72 Ford, a Torino.

25 Q It was not an agency care?

A It was officially paid for by the United States Government.

Q It was not what you call an official car?

A Official Government vehicle. In essence it was radio equipped.

Q Where did you sit and where did Mr. Capra sit after you effectuated his arrest?

A In the rear seat. I was on the left side; he was on the right side, in the rear seat.

Q Who else was in the vehicle and where were they sitting?

A Detective DeMarco was driving the vehicle, in the driver's seat, and Ed Kirkman was sitting in the passenger side of the front seat.

Q What about the other gentleman, the public relations man?

A I believe he went into the other vehicle that was up with the agents and the photographer.

Q The other vehicle being the vehicle of Agents Allen and Sokel; is that correct?

A That is correct.

Q So he left. Did he leave prior to your leaving Northwood Circle?

MR. SLOTNICK: For the record, your Honor, Northwood

1 RDP 8 Gillespie - cross

2 Circle being the address of defendant Capra.

3 A I believe we left in a group. One car followed the
4 other car.

5 Q And the other car contained Agents Allen, Sokel,
6 the photographer and the gentleman from the Publicity Depart-
7 ment?

8 A Correct. Also, I believe, Tom Plate from New York
9 Magazine, a writer, freelancer.

10 Q When you say "the photographer", for the purpose
11 of the record only, do you know his name or whom he worked
12 for?

13 A No. Yesterday I had said he was a Times photograph-
14 er. I believe he was a Daily News photographer. I recall
15 he was definitely a Daily News photographer, because I
16 seen my picture that he had taken on the front page of the
17 paper, of the Daily News.

18 Q At this time, prior to your leaving Northwood Circle,
19 you stated you had a conversation with Mr. Santangelo; is
20 that correct?

21 A We had been in conversation; correct.

22 Q Prior to leaving Northwood Circle, when was the
23 last time that you had a conversation with Mr. Santangelo,
24 pinpointing where you were, where he was, where the defendant
25 Capra was.

1 RDP: 9 Gillespie - cross

2 A The last conversation we had, I was inside the car.
3 I believe he asked me where was Mr. Capra, where were we
4 taking Mr. Capra? I told him we were going to NBDD Head-
5 quarters, at 555 West 57th Street.

6 Q And you also stated --

7 MR. SLOTNICK: Withdrawn.

8 Q When did you first read the rights, or when did
9 you first render to Mr. Capra what you considered to be his
10 constitutional rights?

11 A Inside the vehicle, outside his house.

12 Q And at the time you were reading these rights to
13 Mr. Capra, where was Mr. Santangelo?

14 A I don't know.

15 Q Isn't it a matter of fact that you testified yester-
16 day that at the time you were reading the rights to Mr.
17 Capra, Mr. Santangelo was standing right next to you and
18 observing the vehicle?

19 A It's possible -- I had said yesterday that Mr.
20 Santangelo, I believe, asked me the question, where was Mr.
21 Capra going after I had read him his rights. At that time, I
22 recall, he was standing outside the vehicle. I was inside
23 the vehicle.

24 Q Well, do you or do you not know whether Mr.
25 Santangelo was standing there and listening to you reading Mr.

1 RDP 10 Gillespie - cross

2 Capra his rights?

3 A No, sir. I don't know what he was doing.

4 Q But you are sure, you are positive that you read Mr.

5 Capra what you considered to be his rights prior to Mr.

6 Santangelo having the last conversation with you?

7 A Yes, sir.

8 Q Now, do you remember telling Mr. Capra that he had
9 the right to talk to a lawyer?

10 of. A Yes, sir. which I

11 Q And that he had a right to have a lawyer with him?

12 A Right to consult with a lawyer.

13 Q Well, didn't he have a lawyer with him, and wasn't
14 he speaking to a lawyer?

15 the New York He had spoken to him; yes, sir.

16 Q Now, you have indicated that Government's Exhibit
17 2 is not the card that you read to the defendant Capra; is
18 that correct?

19 A That is right.

20 Q Do you know where the card is that you read off of
21 to the defendant Capra?

22 A I believe possibly that Detective DeMarco may have
23 it.

24 yes, Q. Detective DeMarco may have it?

25 A Right.

1 RDP 11 Gillespie - cross

2 Q Would you know why it is in his possession?

3 A Well, I was a City police officer, am a City police
4 officer. I have the New York form of rights. I generally
5 carry that in my wallet. At the onset of this arrest inci-
6 dent, we were furnished with BNDD forms, Federal forms. I
7 believe Detective DeMarco had in his possession the form.
8 I may have asked him for it, read Mr. Capra his rights and
9 returned it to him. Subsequently, I picked up an exact copy
10 of, which I kept, which I gave you.

11 Q Sergeant - I call you "Detective". Is there a
12 difference?

13 A Not really.

14 Q Sergeant Gillespie, is there a difference between
15 the New York rendition of constitutional rights and the
16 Federal rendition of constitutional rights?

17 MR. PEPPER: Objection, your Honor. The witness
18 testified he read the Federal form.

19 HONOR. IS THE COURT? Do you need this witness to tell you?

20 MR. SLOTHICK: I need this witness to tell me,
21 your Honor, anything, and the Court...

22 THE COURT: (To the witness:) Do you know?

23 THE WITNESS: I believe there may be a variation;
24 yes, sir. Read whatever the State...

25 Q In other words, what you tell the defendant might

1 BDP 12 Gillespie - cross

2 be different in a State case from in a Federal case?

3 A I believe the wording of the rights is different.

4 Q How many arrests have you made, if you know, where
5 you have read the State rights to an individual?

6 MR. FEFFER: Objection, your Honor.

7 THE COURT: What is the relevancy?

8 on this. MR. SLOTNICK: May we go to the side bar? I think
9 it would be proper. (In open court.)

10 THE COURT: All right. We have made some trips to
11 the side bar that were unnecessary. Is this one necessary?

12 MR. SLOTNICK: I think so, your Honor. Just so the
13 witness does not hear what I am attempting to get it.

14 THE COURT: I understand that, but some of the
15 things we concealed from witnesses they could have learned
16 with no injury to any of us.

17 (At the side bar:)

18 MR. SLOTNICK: What I am attempting to show, your
19 Honor, is this witness' great familiarity with whatever the
20 State form may be, that he can do it by heart, by rote, with-
21 out reading anything, and the Court can draw the inference
22 that when he allegedly read from some card that I don't know
23 exists -- and we will find out whether it does -- that he may
24 have just read whatever the State rendition is.

25 That is the purpose of it. I am attempting to test

1 RDP 13 Gillespie - cross

2 his memory to see whether he is that familiar with it, so
3 if your Honor gave me a card of Jack and Jill, I would
4 probably read it from my own memory rather than looking at the
5 card.

6 That is what I am attempting to get at.

7 THE COURT: You would be better off with a jury
8 on this. But go ahead. See what you can do.

9 (In open court:)

10 MR. SLOTNICK: May we have the last question read
11 back, your Honor?

12 (Question read.)

13 A Personally, maybe four arrests, but I also super-
14 vised other arrests, with maybe an additional four arrests.
15 So eight arrests.

16 Q Let me ask you this: How many times do you remember
17 reading a State rights form to individuals?

18 A Approximately ten times.

19 Q And would you say that you have studied that form?

20 A More or less, yes. Studied, committed to memory?

21 Q Yes.

22 A No. I rely upon the written document.

23 Q In other words, if I asked you right now to tell
24 me what you would tell a defendant when informing him of his
25 rights, what would you say?

1 RDP 14 Gillespie - cross

2 A I'd have to refer to the document, because I believe
3 in reading it directly from the document.

4 Q Well, assuming that you were making an arrest and
5 you did not have your card, and you wanted to at least attempt
6 to render the reading of the rights as you know them: what
7 would you tell an individual?

8 A I would not, because I know that could invalidate
9 an arrest, or a prosecution, at least.

10 Q Do you remember at all what you told or what you
11 read to the defendant Capra on the night of April -- or the
12 morning of April 13th?

13 MR. SLOTNICK: I am sorry. I am confused on this
14 point. Is it the 14th or the 13th? May we have a stipulation
15 of the Government?

16 MR. FELD: Why don't you ask the witness?

17 A It was the morning of the 14th.

18 Q Do you remember what you read to the defendant
19 Capra about the morning of the 14th?

20 A I remember looking at the card and reading the card
21 word for word. The exact wording I don't remember.

22 Q Do you remember what color the card was?

23 A It was a yellow card.

24 Q Do you remember who had given it to you?

25 A I believe Frank DeMario had given it to me.

1 RDP 15 Gillespie - cross

2 Q It is your best recollection that that card is
3 presently in his custody?

4 A Yes, sir.

5 MR. SLOTNICK: I would ask the Government to make
6 an attempt to produce that card for my viewing. I make that
7 as an official request to the Court.

8 THE COURT: I am not going to order them to do it.
9 If they can find it, good.

10 Look: this case is going to last a while, and there
11 are going to be links in the chain where I am going to have
12 to make certain findings of fact, as I tried to indicate to
13 Mr. Feffer a little while ago, where I don't have mathematic-
14 al certainties.

15 I hope counsel will help me by not wasting my time
16 trying to get mathematical certainties in areas that are not
17 that interesting.

18 Please proceed.

19 MR. SLOTNICK: I will go to something else, your
20 Honor.

21 Q About what time did you leave Northwood Circle?

22 A About six-thirty in the morning.

23 Q About six-thirty?

24 A Yes.

25 Q And where did you proceed, sir?

1 RDP 16 Gillespie - cross

2 A Proceeded to 555 West 57th Street.

3 Q During the course of your drive to Northwood
4 Circle, did you ask the defendant Capra any questions?

5 A I commented to him during the drive down. I did not
6 ask him any pertinent questions, just more or less something
7 to the effect, just for my own personal -- what you call
8 intelligence, so to speak: if he had seen me before, because
9 we had conducted a lengthy surveillance on him.

10 Q Did he answer that question?

11 A Yes.

12 Q As a matter of fact, he said nothing?

13 A No; he said he had not seen me before.

14 Q Did any of the other individuals in the automobile
15 question Mr. Capra?

16 A I believe Frank DeMarco may have commented to him
17 to the effect of "How come you hid?" He said he did not want
18 to embarrass his family or guests over or children in the
19 house or something to that effect.

20 Q Did Mr. Kirkman ask Mr. Capra any questions?

21 A No, sir.

22 Q Now, you specifically stated you did not ask him
23 any pertinent questions.

24 A Right.

25 Q I presume that was out of respect to the fact that

RDP 17 Gillespie - cross

Mr. Santangelo had asked you not to?

A No, sir.

Q Why didn't you ask him any pertinent questions?

A Because I assume -- after it being apprised of his rights, he had decided to remain mute, in essence.

Q Now, did he indicate that to you?

A No, sir. No, sir; he did not.

Q What caused you to come to that conclusion, that he decided to remain mute?

A Because he had been in conversation with his lawyer, and I seen no point in asking him any pertinent questions.

Q What time did you finally arrive at West 57th Street?

A Must have been a short time after seven o'clock, maybe seven-fifteen, seven-thirty.

Q Did you maintain the defendant Capra in custody?

A I maintained him up to the point where he reached the processing stage.

Q Let's go through that, if we can, and see if we can deal with it swiftly.

You drove to 57th Street?

A Right.

Q You have told us all the conversation that occurred in the automobile up to reaching 57th Street; is that correct?

1
2 A That I can recall at this time, yes, sir.

3 Q Now, where did Mr. Capra disembark from the auto-
4 mobile and with whom?

5 A With myself, I maintained custody of him, and
6 we went in through a garage entrance facing, I believe,
7 Eleventh Avenue. There was a special freight elevator that
8 we brought the prisoners in on.

9 Q At this point was Mr. Capra handcuffed to you?

10 A Not handcuffed to me. He was in handcuffs.

11 Q In handcuffs?

12 A Right.

13 Q Who was with him at this period of time?

14 A I believe Detective -- possibly Detective DeMarco
15 was present at that time.

16 Q You were definitely there?

17 A Yes. I believe Frank had parked the car, Frank
18 DeMarco had parked our vehicle and joined us while waiting
19 for the elevator.

20 Q Did Mr. Kirkman go up with you?

21 A No, sir.

22 Q Did anyone else go up with you?

23 A There was a Lieutenant Whelan present at the door.
24 His function was to supervise the incoming prisoners.
25 I don't believe anybody else was with us.

1 Q From the time you disembarked from the automobile
2 until the time you reached the elevator, did you have any
3 conversation with the defendant Capra?
4

5 A No, sir.

6 Q Did you ask him any questions?

7 A No, sir.

8 Q Anybody else ask him any questions?

9 A No, sir.

10 Q When you passed Lieutenant Whelan, where did
11 you go?

12 A Onto the elevator and up to, I believe, the 18th
13 floor.

14 Q Then what happened -- withdrawn.

15 During that period of time did you ask the defendant
16 Capra any questions?

17 A No, sir.

18 Q Then what happened?

19 A After getting off the elevator, I don't believe
20 there was a desk there. We announced ourselves, more or
21 less, we told them we had defendant Capra and they directed
22 us inside into an interior corridor where we turned over
23 the defendant.

24 Q Who did you turn him over to?

25 A Mike Waniewski, an agent for the BNDD.

Q I didn't hear that name.

A Mike Wanievski.

Q Up until this time -- withdrawn.

From the time you last told me to the time you turned the defendant over to Agent Wanievski, did you ask the defendant Capra any questions?

A Not that I can recall.

Q Did anybody else in your presence ask him any questions?

A I believe somebody may have asked him his name but that was all.

Q Did you speak to Agent Wanievski in turning over the defendant Capra?

A Yes, I said, "This is Capra."

Q Did you tell him anything else?

A No, sir.

Q Did he give you a receipt for the possession of the defendant?

A No, sir.

Q You just turned him over?

A Right.

Q Did you indicate to him that Mr. Santangelo had been to the house or anything of that sort?

A No, sir.

Q Did Agent Waniewski acknowledge knowing the defendant Capra?

A No, sir. He took my word for it, I assume.

Q Did you know Waniewski before this occasion?

A Yes.

Q Did you know that you were to turn over Capra to Waniewski when you arrived at West 57th Street?

A I knew I was to turn him in to a processing area under the supervision of Waniewski.

Q Of BNDD?

A Right.

MR. SLOTNICK: No further questions.

MR. PEPPER: No redirect, your Honor.

THE COURT: All right, Sergeant, thank you.

(Witness excused.)

MR. SLOTNICK: May I at this time make a motion to ask one of my witnesses to appear who is an attorney who has other business? I don't think it would prejudice or affect the Government or the prosecution at all.

THE COURT: Any objections?

MR. FELD: No objections.

MR. SLOTNICK: Michael Santangelo, please.

M I C H A E L S A N T A N G E L O, called as
a witness by defendant Capra, being first duly

sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SLOTNICK:

Q You are an attorney, is that correct?

A That is correct.

Q A member of the bar of this Court?

A Yes.

Q On April 14th of 1973, at approximately 6:00 p.m., do you recollect where you were?

A Yes, I do.

Q Would you tell us where you were and what happened?

A Well, at 6:00 in the morning I was at the entrance to the Capra residence. I parked my car in the driveway. I got out, walked up the walk to the front door. As I was walking, I observed two motor vehicles pull up to the house driving very fast. The cars stopped. Several agents -- who I later learned were agents -- got out of the car. I say "several" because I don't remember whether it was three, four, six, or whatever.

Q But there were at least two?

A There were at least three or four agents. I turned, and one of the agents indicated to others, "He is a lawyer." They backed away because they were coming forward. They backed away. They got back into the motor

vehicles.

I knocked on the door --

Q Mr. Santangelo, did they at this point indicate any indicia of law enforcement?

A Yes. Two or three of the agents had jackets on. They pulled their jackets back. I noticed guns -- on one agent. He had his hand on his gun. When another agent said, "That's a lawyer," they backed away, got back in the car. A few agents stood in the street.

I knocked on the door. Mrs. Capra answered the door. I said, "Hello." She looked at me and I looked off to the left, and behind the left-hand door, which was a fixed door, I noticed a male who I knew to be a city detective. I had seen him in the courts over the years. And I said, "Hello." He said, "Hello, Counselor, come on in."

Q Did you then know his name?

A I didn't know his name at the time.

Q Do you now know his name?

A Yes. It was Sergeant Gillespie.

I walked into the house and I noticed in the kitchen -- you could see the kitchen from the door, and there were two gentlemen sitting at the table of the kitchen. I walked into the kitchen and asked Sergeant Gillespie what

1
2 the purpose of his visit was. He said he was there to
3 arrest John Capra. I asked him whether or not it was a
4 federal arrest or a state arrest, and he indicated to me
5 it was federal.

6 Q Did he indicate prior to this who the gentlemen
7 were that were sitting at the kitchen table?

8 A Not at that time.

9 Q I'm sorry. Go ahead.

10 A He told me it was federal. I asked him whether
11 he had an arrest warrant. He said, "No," he didn't.
12 I think I asked to see it. He said he didn't have it. I
13 asked him whether he had one and he said it's back at
14 headquarters. I said, "In that case, I don't think you
15 have any right to be in the house."

16 He said, "I can go back to headquarters and
17 get the warrant, and in the meantime we can have the New
18 Rochelle police come up in front of the house and bullhorn
19 the defendant out."

20 I said, "What is the problem?"

21 He said, "We are waiting for Capra."

22 At that time I went into the kitchen and he
23 followed me in the kitchen. I saw these two gentlemen
24 sitting at the table. They hadn't said anything. I asked
25 them who they were. He indicated to me they were agents.

They never said anything at any point in time.

I turned around. I noticed the telephone in the kitchen was off the hook. Mrs. Capra motioned to me. She was in the foyer outside the kitchen. I went out and talked to her in the den, which is next to the kitchen. She told me that she would like me to come upstairs --

MR. SIDTNICK: It is indicated to me by co-counsel that Sergeant Gillespie has been in the courtroom. I have asked Mr. Feld to exclude him and he has done so, so he has left the courtroom.

I'm sorry, your Honor, for the interruption.

Q Would you continue?

A As a result of the conversation with Mrs. Capra, I went upstairs to the bedroom and had a conversation with John Capra.

I came downstairs and told Agent Gillespie -- Sergeant Gillespie that Capra would be down in ten minutes. He said okay.

About a minute after that, about a minute after that, he says, "I'd better go upstairs because now I know he is upstairs. I'm responsible and I got to go up." And I followed him up the steps.

Q Did anyone go upstairs with you?

A The two gentlemen in the kitchen followed us up

the steps into the bedroom.

Q Those were the gentlemen identified to you as agents? As being agents?

A Yes.

As we were going up the steps, I told Sergeant Gillespie that I didn't want him to ask Capra any questions, and he said, "Of course not." I said, "Thank you very much. You understand," I said. He said, "Yes."

Q Had you already consulted with Mr. Capra?

A Yes.

We went into the bedroom. Mr. Capra had been dressed and he was combing his hair or shaving with an electric razor, I forget which it was. Sergeant Gillespie came in, told him he was going to arrest him, which he did at that point. He came back down the steps. As they came back down the steps, they went back into the kitchen. Capra had an orange juice or something.

At that point Gillespie had indicated to me that he wanted to take him out. I said, "Okay. Again, no questions. Where are you taking him?"

He said, "57th Street."

The conversation ensued as to whether or not I could come down to 57th Street to speak with him.

Q What did he say to you and what did you say to him?

1
2 A I was interested in where he was taking him
3 because I wanted to talk with Capra. I was interested
4 in when he was going to arraign him, so I asked him a
5 question as to when he thought he would be finished with
6 him, whether he thought he would be arraigned that after-
7 noon. He indicated that they were taking him to 57th
8 Street for questioning. He didn't know whether I could
9 see him, but that's where he would be. He said that he
10 might be arraigned this afternoon, that it wasn't up to
11 him. It was general questions like that, and answers, which
12 didn't help much, but I asked them anyway.

13 He said he then was going to take him out.
14 He walked towards the door. At that point he cuffed Capra.
15 I didn't leave the door with him but they went out
16 alone with Gillespie and another agent met them at the
17 door and then the two other gentlemen followed. Then
18 about -- I was in the kitchen telling his wife I would
19 call her when I knew more. They went out the door and
20 as they were halfway to the car, which is about fifty
21 feet from the door, I came out of the house and saw some-
22 one taking pictures. Then they took him into the car
23 and I was about twenty-five feet from the car and I was
24 concerned with this fellow taking pictures, who he was.
25 They put him in the car and drove away. I went back into

the house, had a conversation with Mrs. Capra, went back home.

Q Now, Mr. Santangelo, do you recollect ever using the term, "client," during your conversations with Sergeant Gillespie?

A Yes, because when I came to the house, when I was in the kitchen, before Capra came down, and before I went upstairs, he asked me whether I was just a friend or an attorney, and I said I'm representing him. I said I've represented him in the past. Apparently I was his attorney.

THE COURT: What did you say, "apparently"?

THE WITNESS: I'm paraphrasing, Judge.

THE COURT: Say what you said.

THE WITNESS: I said that I'm his lawyer and I'm representing him now. That's about all I can remember. I'm positive I told him that I was his attorney at the time.

Q Now, after you left the kitchen you went upstairs, you came down, did you have another conversation that you reaffirmed that you were the attorney and John Capra was the client, as best you can remember?

A Yes. That was when he came down and was having his orange juice in the kitchen, when I was asking questions

as to when I could see him, where he was being taken. I said, "I want to come down to see him." I don't think I said at that point, "You know, I'm his lawyer." I was asking him questions which related to what he was doing with him and how I could arrange a court appearance on that day.

Q To your mind, in view of the activities and the motions that you went through, there was no question it was conveyed to the sergeant that you were Mr. Capra's attorney?

A None whatsoever.

Q Did you notice anything about the telephones when you entered the Capra home?

A Yes, the phone in the kitchen was off the hook, the phone in the den was off the hook. Thinking about that when I came back into the kitchen after having a discussion with Mrs. Capra, I turned to Sergeant Gillespie, I said, "Don't you think we can put the phones on the hook?"

He laughed and he said, "Well, no reason to have them on the hook." I think he made some kind of a joke to Mrs. Capra. He said, "Well, if we put the phone on the hook, that means that the agents outside can overhear everything that's in the room." It was something like

that. He made a joke about putting the phone back on the hook.

Q Now, you then say that you left. About what time did you leave?

A I left the house -- this whole thing took possibly, the most, twenty minutes, twenty-five minutes. They may have left at 6:30, something like that.

By the way, I'm not positive whether I got there at 6:00. It may have been 5:30, quarter of 6:00.

I went home about 6:30, to go home to dress.

Q At any time between the time you arrived at the Capra residence and the defendant Capra left your sight and hearing, do you remember anybody reading any constitutional rights to him?

A Never.

Q Not in your presence?

A No, sir.

Q Then what did you do?

A Well, I went home. I got dressed. About 9:00 o'clock, 9:15, I went down to the city and I went to 57th Street. I walked into the lobby, a rather large lobby which extended from, I believe, 58th to 58th or 58th to 59th Street, and there was a long table at the elevator entrance where you go into the elevator shafts. And

seated at that table were two gentlemen with walkie-talkies and whatever, and there were two agents in the hallway at large with shotguns.

Q About what time was this?

A I'd say about 9:30, quarter to 10:00.

Q By the way, Mr. Santangelo, do you live within a five-minute radius of Mr. Capra's home?

A Yes, I do.

Q You are now at BNDD headquarters about 9:30, quarter to 10:00?

A That is correct.

Q Tell us what happened.

A I went to the table. As I said, there were two gentlemen sitting there, both with weapons, and two other agents walking up and down the hallway with weapons.

I identified myself. I gave them my card. I said that I wanted to know where Capra was in the building and also Guarino. They used the walkie-talkie to call upstairs, or whatever thing they had. Either a telephone or a walkie-talkie. I think it was a walkie-talkie. But they called upstairs anyway and they said, "No, you can't come up. They are going through processing."

I said, "Okay. When can I come back?"

They said, "We don't know."

At that point I think he was on the telephone and I said, "When can I come back?" And he said this to the party on the other end, and the reason I think it was a walkie-talkie, because I remember the reply saying something like "He can do what he wants." They didn't tell me what time to come back but I came back at 11:30.

Q Had you identified yourself by this time?

A Yes. I had given them my card.

I went to Central Park. I came back about 11:30, and the same thing happened. I don't remember the same two gentlemen were at the desk or whether there were different people there.

Q Did you identify yourself?

A Again, yes.

Q Did you indicate you were the attorney for Capra?

A Yes.

Q Did they indicate they were BNDD agents?

A They didn't indicate they were BNDD agents, but the three were agents.

Q They had guns, walkie-talkies?

A I recall a weapon on the desk. I'm not sure. I remember the shotgun thing in the hallway.

So, at 11:30 I asked them again, because I wanted to go up. He said, "No, not now." So I figured I'd be

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wasting my time by any more questions, and I went and used the telephone which is in the hallway of that building to call upstairs.

When I called upstairs, I identified myself and I asked the person who answered the phone what his name was and he refused to identify himself. I told him who I was, who I wanted to speak with, and then he talked to someone -- whoever he was and I could hear him ask whether or not any lawyers could come up. I didn't hear the reply. He came back and he said, "No lawyers can visit."

So I said, "Okay. When do you think you people will be finished?"

He said, "We wouldn't know."

I hung up, went back to Central Park.

I came back at 1:30, repeated that same process, only I didn't call that time. I came back again at 3:30 and I think it was 3:00 o'clock or 3:30 and I saw Sergeant Gillespie coming into the building. He had a brown jacket on, the same jacket he wore -- I don't remember, but he came into the building and I asked him whether or not it was possible if I could come up to speak to Capra and Guarino. He said he didn't know, it wasn't up to him.

So I called again. Now, at that time, 3:30, there was no one downstairs. My recollection is there was

no one downstairs. So, I recall someone saying that they were on the 18th floor or 19th floor, and I took the elevator up to the 18th floor and no one was there. I later learned that they were on the 19th floor, and I got off the wrong floor, but that was the BNDD headquarters as well. I'm pretty positive. I've never been there since nor before. No one was there and I came back down and I didn't know whether they were. I used the phone out in the hallway again, and I was told at that time that they were all finished and everybody was gone.

So I thought I had missed the boat. I went down to West Street. I got to West Street about ten to 4:00. Now, my recollection is that the guard at West Street in the booth told me that certain defendants were brought there from this arrest and were there, and others were brought to Bergen County. Through that conversation, the next day I discovered that Guarino and Capra and Dellacava were lodged in Bergen County rather than West Street. But I don't know when they got to Bergen County.

Q We may not have to go into that.

MR. SLOTHNICK: May I have a representation from the Government now as to when the alleged Capra statement took place, to see whether or not I have to go into Bergen County?

MR. PEPPER: We have already made the representation as to the time in a letter addressed to Mr. Slotnick but I believe it was approximately 9:00 o'clock in the morning, Saturday morning, the 14th.

Accordingly, from this point on, the Government is going to object to continuous questions going on as to the activities that afternoon, that night, lodging facilities, and that type of thing.

MR. SLOTNICK: I'm not going to ask any questions about Bergen Count. It's obviously irrelevant -- or it may not be.

Q Now, Mr. Santangelo, you eventually got to see the defendant Capra. Is that correct?

A Yes.

Q When was that?

A I think it was at approximately 1:00 or 2:00 o'clock in the afternoon. I'm not sure.

I went there with Leo Guarino's brother, Pat, out to Bergen County.

Q Who is also an attorney?

A Yes.

Q And do you recollect when the defendant Capra was arraigned?

A He was into the courtroom at 10:30 in the morning,

or thereabouts, and he was arraigned about 3:00 o'clock in the afternoon.

Q Do you know whether any other defendant with regard to the mass narcotics arrest was arraigned prior to Monday?

A Well, subsequently I learned that Mrs. Ceil Sperling was either arraigned or bail was set on Saturday. I learned that afterwards.

Q And have you had occasion to see Mrs. Sperling?

A Well, I've seen her at her trial, when I participated at the trial.

Q Did she appear to be an elderly woman?

A Yes.

MR. FEFFER: Objection to the relevance of this line of questioning.

MR. SLOTNICK: Indicating that special considerations could have been made for an elderly woman, they could have been made for eighty-nine other defendants, your Honor.

THE COURT: You represent the whole eighty-nine?

MR. SLOTNICK: No. I'm sorry. For Capra.

Your witness.

CROSS-EXAMINATION

BY MR. FEFFER:

1
2 Q Mr. Santangelo, what time did you wake up on
3 the morning of the 14th?

4 MR. SLOTNICK: I object to the question as
5 irrelevant.

6 THE COURT: Let me hear it.

7 Q What time did you arise on the morning of
8 Saturday, April 14th, this year?

9 MR. SLOTNICK: Objection.

10 THE COURT: Overruled.

11 A 4:30.

12 Q How were you woken?

13 A A phone call.

14 Q And was that telephone call from John Capra?

15 A No.

16 Q Who was it from?

17 MR. SLOTNICK: Objection, your Honor.

18 THE COURT: What ground?

19 MR. SLOTNICK: It's irrelevant.

20 THE COURT: Overruled.

21 MR. SLOTNICK: The question is not how he got
22 there or why but the fact he got there.

23 THE COURT: Overruled.

24 A The phone call was from Emma Guarino.

25 Q And isn't it a fact that Mrs. Guarino informed

you at that time that there were some agents or police officers at the Guarino household?

MR. SLOTNICK: Objection as to any testimony.

It's hearsay, your Honor. It may even be privileged.

THE COURT: Are you objecting on the ground of privilege?

MR. SLOTNICK: I'm not.

THE COURT: Don't tell me what objections you may make because I don't have to rule on those. Tell me what objections you are making and I'll rule on them.

MR. SLOTNICK: Irrelevant and hearsay.

THE COURT: Overruled.

A I don't understand your question, Mr. Feffer.

THE COURT: Read the question, Mr. Reporter.

(Record read.)

MR. McALEVY: I'm going to object to any type of conversation with my client or my client's wife on the eve of his arrest. I'm going to raise the privilege.

I don't know what this might elicit and it might be harmful to my client.

MR. FEFFER: First of all, I was not informed attorney, that Mrs. Guarino was a defendant in this case or was

represented by Mr. McAlevy. I fail to see how notifying

an attorney that there were police officers at the household

has anything to do with any privilege, seeing as Mr.

Santangelo THE COURT: He was the attorney for Guarino at that point. presence of the police

presence? THE COURT: Well, communications to him --

MR. McALEVY: If he wants to raise the privilege, yes, I understand that.

THE COURT: You claim that's privilege?

THE WITNESS: Not my privilege.

only question THE COURT: But as the lawyer at that time for

Mr. Guarino, would you say that was a privileged communication? I'm asking you.

THE WITNESS: I would say what Mrs. Guarino told me was told to her by her husband, which she just repeated what her husband asked her to tell me.

THE COURT: Was it a privileged communication, that there were agents there?

A I don't think that is a confidential communication.

MR. McALEVY: If I understand it, Mr. Guarino was apprehended on the early morning hours of the 14th.

certainly; if he gave his wife instructions to talk to an attorney, that most certainly would be privileged.

THE COURT: Anything she says to him?

MR. McALEVY: Judge, why would she be calling an attorney at the time the man was arrested? I imagine

it would be privileged.

THE COURT: You think that the report of the presence of the police officers was going given in confidence?

MR. McALEVY: Judge, I don't know what this conversation was about.

THE COURT: I have one question before me: Did she say there are police officers there? That's the only question, and you have now interposed a plea of privilege.

I'm asking you, is that a confidential communication?

MR. McALEVY: It might be. Yes, your Honor, it very well might be.

THE COURT: Objection overruled.

Answer the question.

A Did she say whether or not police officers were at her house at the time she was talking with me, or were, past tense, at the house? Past tense or present tense, Mr. Feffer?

Q Both.

A She said they were there.

Q And you were informed that Mr. Guarino had been arrested, is that correct?

1
2 A By Mrs. Guarino, yes.

3 Q Now, what did you do after hearing this infor-
4 mation?

5 A I asked her --

6 MR. McALEVY: I'm going to object to this.
7 Now, certainly, we can get into a very dangerous privileged
8 area.

9 Q I said what did you do? Not what did you say to
10 her.

11 A I got dressed.

12 THE COURT: That's not privileged.

13 MR. McALEVY: I agree with you, sir.

14 A I got in my car and I went to the Capra house.

15 Q Had Mrs. Capra called you?

16 A She couldn't call me. The phones were off the
17 hook.

18 Q Had John Capra called you?

19 A He couldn't call me, either.

20 Q Will you tell the Court why you went to the Capra
21 household?

22 MR. SLOTNICK: Objection, your Honor.

23 THE COURT: On what ground?

24 MR. SLOTNICK: I feel that, again, and perhaps
25 I have jumped up prematurely, and perhaps it should be my

brethren that should, so I will withdraw the objection.

MR. McALEVY: If he says in response to a conversation he had with Mrs. Guarino, I certainly think it's privileged. Now we have nothing to do with the police coming to Guarino's house, we already have that in the record that Mrs. Guarino told him the police were there, and whatever he did after that certainly would be privileged. This man was an attorney at the time who was representing both my client of today and Mr. Slotnick's client. I'm really afraid that we are on dangerous ground here.

THE COURT: When had you been retained by Mr. Guarino?

THE WITNESS: For this particular case, Judge?

THE COURT: Yes, start off with this particular case.

THE WITNESS: When his wife spoke to me.

THE COURT: At 4:30 a.m.?

THE WITNESS: That is correct.

THE COURT: And when were you retained by Mr. Capra in this case?

THE WITNESS: I would think at the time that I spoke to him in his room.

THE COURT: At 6:00 a.m.?

THE WITNESS: Yes.

THE COURT: So at the time you hung up the phone and went to Mr. Capra you had not yet been retained by him?

THE WITNESS: No.

THE COURT: Now, you say your retainer by Mr. Guarino occurred at 4:30 a.m.?

THE WITNESS: I would say so.

THE COURT: And tell me how that retainer occurred. What did Mrs. Guarino say, or Mr. Guarino, and what did you say?

By the way, any of these questions that you wish to object to, please do. I gather --

MR. McALEVY: Yes, your Honor.

THE COURT: I am asking them to see if and when an attorney-client relationship arose, without which there is no privilege.

MR. McALEVY: Judge, do I understand that you are saying that a man must be retained before an attorney-client privilege can arise?

THE COURT: I am indeed saying that.

MR. McALEVY: I beg to differ with the Court. I don't think the actual retaining has anything to do with the privilege. I would like to argue that point.

1 THE COURT: Go ahead and argue it.

2
3 MR. McALEVY: Judge, for instance, if I have
4 represented a client for years and that client is in trouble
5 and I find out about it, I have the understanding that
6 I will represent this man if I'm the only man that ever
7 represented this man in his prior involvement with the law.
8 I don't think the actual saying that I'm charging you
9 \$500 for that would have anything to do with respect to
10 the attorney-client privilege if it comes before that
11 particular conversation. For instance, if a man calls
12 me up today and said, "I've just murdered my wife and I'm
13 allowed to make this one phone call down at West Street,"
14 and he hangs up, I go down to West Street, do you mean
15 to say any court or prosecutor would ask me questions
16 with respect to any admissions that man had made on the
17 phone, even though I had not been formally retained?

18 THE COURT: I understand your argument.

19 Had you been Guarino's lawyer on a retainer
20 relationship before October 14th?

21 THE WITNESS: I don't understand that, Judge.

22 THE COURT: Well, were you his lawyer before
23 4:30 a.m. on any continuing basis?

24 THE WITNESS: I represented Guarino in a prior
25 state court proceeding.

1
2 THE COURT: When?

3 THE WITNESS: In February of 1972. I represented
4 him in a prior state court proceeding to that. I believe
5 it was in June or July in Bronx County, a grand jury
6 matter.

7 MR. MCALEVY: May we have a voir dire on this
8 matter, Judge, rather than this helter-skelter questioning
9 because I've --

10 THE COURT: The reason it's helter-skelter is
11 I'm doing it and I don't generally do it.

12 MR. MCALEVY: I don't mean it that way.

13 THE COURT: Just sit down. If you have objections
14 to any particular questions, make them.

15 MR. MCALEVY: I do. I have been informed by
16 my client of a conversation that he had with his wife prior
17 to the phone call with Mr. Guarino in the presence of
18 narcotics agents relevant to obtaining Mr. Santangelo as
19 his lawyer.

20 THE COURT: I don't care what you have just been
21 told by your client. I'm asking Mr. Santangelo what he
22 knew and what his situation was. He is the one on the
23 stand. You can bring that out in any pertinent way at any
24 pertinent time.

25 But, at the moment, this attorney is on the stand

and the question is whether certain questions put to him are the subject of the attorney-client privilege.

Now, we must move a step at a time. I want to know what he knows about the foundation for this privilege. If, after we have exhausted his knowledge, you want to put your client on the stand to establish a further foundation, I'll hear it.

MR. McALEVY: That's why I would like a voir dire now with respect to Mr. Santangelo with -- I would like to have the opportunity before the Court or the Government asks him questions to set a foundation with respect to this attorney-client privilege.

THE COURT: You want to ask Mr. Santangelo questions?

MR. McALEVY: Yes.

THE COURT: All right.

VOIR DIRE EXAMINATION

BY MR. McALEVY:

Q Mr. Santangelo, isn't it a fact that you represented Mr. Guarino back in February of 1972 with respect to an arrest made by Detective George Eaton of the New York City Police Department?

A That is correct, yes.

Q And that was some three -- I'm sorry, that was

February of what year?

A February 1972.

Q '72. And you were retained in that matter?

A Yes.

Q And on April 14th you received a phone call from Mr. Leo Guarino's wife, is that correct?

A That is correct.

Q Now, with respect to that conversation, did she tell you what instructions Mr. Guarino had, if any, for you concerning your representation of him as a result of an arrest that morning?

A Yes.

Q Did she also tell you that conversation was made in the presence of agents from the BNDD that were at his house?

A Not that I can recall.

Q Do you know whether Mr. Guarino was present and able to talk to you when Mrs. Guarino informed you or talked to you with respect to your representation of Leo Guarino that morning?

A No, he was not present.

Q Did she tell you where he was?

A No, she couldn't tell me where he was.

Q Do you know from your own knowledge whether he

was in the house at that time?

A She wasn't in the house when she called me.

Q Did she tell you where she was calling from?

A Calling from an outside telephone.

Q Did she tell you whether Leo was still in the house at that time?

A No. She told me that the people that came in to arrest him had taken him away.

Q Tell us exactly what Mrs. Guarino said with respect to Leo's request as to your being his attorney at that time.

A Well, she prefaced the entire question with "Leo told me to call you."

Q You had represented Mr. Guarino prior to that, as we know.

A On many occasions.

Q Now, with respect to that conversation with Mrs. Guarino, did you at that time feel -- strike that.

During your direct examination by Mr. Feffer, didn't you say you went down to 57th Street to speak with Mr. Guarino and Mr. Capra?

A That is correct.

Q Why did you want to speak to Mr. Guarino at that time?

1
2 A Well, I had never had an opportunity to speak
3 with him, number one. I had never had an opportunity to
4 tell him what a lawyer normally tells a client who's been
5 arrested. I had never had an opportunity to learn what
6 it was all about or to reassure him that I would be present
7 when he was arraigned, and all of the things that an
8 attorney would do to reassure a client prior to his
9 arraignment and during the course of his detention that
10 something is being done to help him.

11 Q In other words, with respect to Mr. Guarino it
12 was your intention when you arrived at 57th Street to
13 advise Mr. Guarino of his constitutional rights?

14 THE COURT: I think you are going beyond the
15 voir dire.

16 MR. SLOTNICK: I would object formally on the
17 record, and may I further object to the entire line of
18 questioning at this point as being irrelevant.

19 Again, I may be repetitive, and I apologize
20 to the Court for it, there can be no questioning at 6:02
21 or 6:05 whether attorney Santangelo spoke to either
22 Mrs. Capra or the defendant Capra himself, the privilege
23 then attached as he became his attorney.

24 THE COURT: It may look that simple to you,
25 Mr. Slotnick, but it doesn't look that simple to Mr. Feffer

nor does it to me.

Mr. Santangelo, though he is a member of our bar and familiar to me and respected by me, is now a witness in this proceeding and there is, as between him and Sergeant Gillespie, a sharp question of credibility, and I can't, much as much as my professional prejudices might cause it, prima facie favor a lawyer over a policeman, or vice versa. So, questions that may affect Mr. Santangelo's credibility as a witness are of prime importance now.

He receives a call at 4:30 a.m. from Mr. Guarino.

I'm perfectly happy --

MR. SLOTNICK: Mrs. Guarino.

THE COURT: Yes.

I'm perfectly happy to have a retainer relationship at that point and to give a spacious construction to the lawyer-client privilege. But the Government is interested now, and Mr. Santangelo and you both know this, in knowing why when you get a call at 4:30 a.m. from client Guarino about an arrest in a very serious federal offense, he quickly dresses and goes to the home of Client "X" or "Y" or "Z."

Now, it is true, if Mr. Guarino said that "I was in this narcotics deal with Mr. Capra, and so, and he too wants you as his lawyer," or Mr. Santangelo was his

1 lawyer, or a lot of things, all of that might be privileged.
2 But it's a question as to what Mr. Santangelo's relationship
3 may have been to these people and it may be a question
4 that affects his credibility.
5

6 That is what we are trying to get at, as I
7 understand it.

8 MR. SLOTNICK: So, when the Court left off, I
9 think we were going through the line of representation
10 that Mr. Santangelo had had with Mr. Guarino --

11 THE COURT: We are about through with this.
12 Mr. McAlevy has established that there is a lawyer-client
13 privilege touching Mr. Santangelo's relationship to Mr.
14 Guarino. But there still may be a permissible way,
15 without trenching on the privilege, to learn why Mr.
16 Santangelo, getting a call from Guarino, instantly leaps
17 into his car and goes to Capra.

18 Now, the reasons for that may be privileged or
19 they may not. So we have to move with circumspection,
20 but I think it can be explored with circumspection.

21 You may sit down, Mr. McAlevy.

22 Mr. Feffer, see how circumspect you can be.

23 CONTINUED CROSS-EXAMINATION

24 BY MR. FEFFER:

25 Q Why did you go to the Capra household on the

1 morning of the 14th?

2 A To see Capra.

3 Q For what reason?

4 MR. SLOTNICK: Your Honor, I object at this
5 point. We are again entering the vein of privileged
6 area. The first comment I would make is I think your
7 Honor deals the term "retainer" as a work of art.
8 Retainer is not and actually what we would call a written
9 or oral retainer. As I understand it, the authorities
10 indicate that an attorney-client privilege engages
11 when an individual possibly solicits advice, even though
12 it may --

13 THE COURT: I think I demonstrated to you Mr.
14 McAlevy's lecture to me and my expression of understanding
15 of it, that retainer doesn't have to be a technical occasion.
16 But it isn't so long that I was a lawyer to make it
17 impossible for me to remember that if I got a call from
18 Client "X" that he had a problem, civil or criminal, I
19 didn't get into my car and rush off to Client "Y,"
20 unless something happened to make me do that.

21 Now, "X" might have told me some privileged
22 thing, so nobody can find out then why I went to "Y."
23 If somebody finds it a material question, I am running off
24 to "Y," what relationship I have to "Y" that might affect
25

2 my credibility as a witness, it's a question worthy of
3 exploration if we can do it without violating the
4 privilege.

5 Proceed.

6 Q Again, Mr. Santangelo, for what purpose did you
7 to to the Capra household on the morning of the 14th?

8 A To talk to Capra.

9 Q At the time when you got into your vehicle and
10 you went to the Capra household, were you representing
11 John Capra?

12 A Yes.

13 Q At that time?

14 THE WITNESS: Your Honor, if I say, I think if
15 I testify to the reason behind my going to the Capra residence,
16 that would relate to the Emma Guarino conversation.

17 THE COURT: That would relate to the Guarino
18 conversation?

19 THE WITNESS: Emma Guarino, yes.

20 THE COURT: Let me try this question. I don't
21 know if it's permissible.

22 Was there anything in the conversation with Mrs.
23 Guarino that might have borne in any way on any possible
24 involvement with Mr. Capra?

25 THE WITNESS: Yes.

1 THE COURT: I think you are going to have to get
2 off it, Mr. Feffer.

3 MR. FEFFER: I want to try another route to
4 get to it.

5 Q Mr. Santangelo, you testified that at the time
6 you got into your vehicle to go to the Capra household,
7 that at that time Mr. Capra had retained you, is that
8 correct?
9

10 MR. SLOTNICK: Objection, your Honor.

11 A I didn't say that.

12 MR. SLOTNICK: That's a legal conclusion and
13 that's assuming a state of facts not in evidence.

14 THE COURT: It's a legal conclusion that is of
15 some importance.

16 Now, look, if Defendant "X" calls me as a lawyer
17 and says, just hypothetically -- it's an interesting
18 problem and I don't have a conclusion -- "I'm in trouble
19 and I think 'Y' and 'Z' are in trouble with me," I as
20 a lawyer wouldn't run off to "Y" or "Z" because I might
21 be accused of barratry, or whatever those words are,
22 about soliciting business. So, they're in trouble and they
23 have to get a lawyer.

24 So, Mr. Feffer is asking, "All right, you repre-
25 sent Guarino and you go running off to Capra because you

1
2 learned that maybe he needs a lawyer. Are you his lawyer?"

3 Now, isn't that a permissible question?

4 MR. SLOTNICK: "Are you his lawyer" is a per-
5 missible question.

6 THE COURT: That's what he is asking. "Did you
7 represent Capra at that time?"

8 A Could you repeat the question or have it read
9 back?

10 Q Did you represent John Capra at the time when
11 you got into your vehicle on the morning of the 14th?

12 A I would say "yes" to that.

13 Q You don't know for sure?

14 A No. I would say "yes." I answered "yes."

15 Q Did Mr. Capra speak to you prior to that time
16 and retain you?

17 A No.

18 Q Did Mrs. Capra retain you?

19 A No.

20 Q Did Mrs. Guarino retain you for John Capra?

21 MR. McALEVY: Objection, your Honor.

22 THE COURT: On what ground?

23 MR. McALEVY: We are talking about a privileged
24 conversation he had with Mrs. Guarino and I don't think
25 the details -- I think they are absolutely privileged.

1
2 Whatever Mrs. Guarino relayed to him, what was spoken to
3 him by her husband, is certainly privileged at this point.

4 THE COURT: Overruled.

5 MR. SLOTNICK: I would say that I have a
6 competing privilege with Mr. Guarino because, as I remember
7 the cases, the original retainer is not privileged.
8 However, the retainer by a retaine, in which there
9 are classic cases on, are privileged.

10 THE COURT: The only pending question is did
11 Mrs. Guarino retain him for Capra at that time? What is
12 your objection to that?

13 MR. SLOTNICK: That is a privileged communication
14 as to the defendant Capra.

15 THE COURT: Why?

16 MR. SLOTNICK: Because the defendant Guarino
17 may have had instructions from the defendant Capra, "If
18 you are arrested, tell your wife," et cetera, in a round-
19 about way. I feel we are treading on a privileged area.

20 THE COURT: We are treading in the area of a
21 privilege.

22 Objection overruled.

23 You may answer that.

24 THE WITNESS: I have great difficulty with that
25 question, Judge. I think it's privileged and certainly as

to Guarino.

THE COURT: As to whether Mrs. Guarino retained you for Mr. Capra?

THE WITNESS: Yes.

THE COURT: Well, I don't think it's important enough for me to skate too close to the line.

I'll sustain the objection. Change the ruling.

Q Will you tell the Court how and when you were retained to represent John Capra?

MR. SLOTNICK: Your Honor, that was my original objection, which your Honor sustained, unless I misheard the question.

THE COURT: He said originally retained, "how and when were you originally retained?"

If you are going to claim any attorney-client privilege as to Capra, then the original retainer is not privilege, is it?

MR. SLOTNICK: It might be, your Honor. I don't know the circumstances surrounding it, but it might be. As I have indicated to your Honor, and this is purely a hypothetical, the name of the original retainer has been considered by Wigmore as not being privileged --

MR. FEFFER: That's why I asked, your Honor.

MR. SLOTNICK: -- the information leading to a

second client given by the original retainor has been held by the authorities, and I would be very happy to present your Honor with the cases on it. I think they are in McCormick, as being privileged communication. So the first contact is not.

THE COURT: He is asking him about the first contact.

MR. SLOTNICK: The first contact he ever had with Capra?

THE COURT: Yes.

MR. SLOTNICK: I don't object to that. I'm sorry, your Honor.

THE COURT: Isn't that what you asked?

MR. FEFFER: I said, "How and when were you retained?"

MR. SLOTNICK: That's not the question.

MR. FEFFER: Originally.

MR. SLOTNICK: No objection if it's the first contact he ever had with Capra in a criminal proceeding.

A In a criminal proceeding?

Q Any proceeding.

A I believe it was 1971 or 1970 in the Bronx, Bronx Supreme Court.

Q In conjunction with what?

1 A The original charge centered around a construction
2 company and checks which were issued to -- allegedly
3 issued to people who were working. There were eventually
4 pleas of guilty to misdemeanor in the case.
5

6 Q Was that the only time in the past you represented
7 John Capra?

8 A Criminally?

9 Q Anywhere.

10 A No.

11 Q Criminal?

12 A Criminal, yes.

13 Q Were you on retainer at the time you went to his
14 house?

15 A What do you mean by "on retainer," Mr. Feffer?

16 Q As you understand the word.

17 A I understand the word "retainer" to be a
18 corporate retainer giving me \$10,000 a week to represent
19 them.

20 THE COURT: Don't tell us your fantasies.

21 Q Mr. Santangelo, did you have an understanding
22 with John Capra prior to the 14th of April, 1973?

23 MR. SLOTNICK: Objection, your Honor.

24 THE COURT: I think we had better move on.
25 I think there is enough of this and I'm not sure what I

make of that 6:00 a.m. visit but let's move on to something else.

Q When you got to the Capra household, who was present?

A Sergeant Gillespie, Mrs. Capra, the Capra children were upstairs in their bedrooms with other girls who were -- I understand they had a blanket party or whatever it is.

Q How did you know that the girls were upstairs?

A I saw them upstairs when I went upstairs.

Q Who else did you see upstairs?

A I don't know whether there were two or three girls with the Capra daughters.

Q Besides the girls and the children.

A I saw Capra.

Q Now, at that point in time, isn't it a fact that the police officers and agents downstairs were under the impression that John Capra was not in the household, if you know?

MR. SLOTNICK: I object to that, your Honor.

THE COURT: Sustained.

Q How did you know John Capra was upstairs?

MR. SLOTNICK: I object, your Honor. That's a privileged communication.

MR. FEFFER: I didn't ask for a conversation.

MR. SLOTNICK: I believe his testimony was "after a conversation with Mrs. Capra I then proceeded upstairs." I think we should leave it at that, your Honor, most respectfully.

THE COURT: As the thing stands, I infer that Mrs. Capra said that Mr. Capra is upstairs.

Q Did Mrs. Capra say this to you alone?

MR. SLOTNICK: Objection, your Honor. That is a privileged communication.

THE COURT: Let's go on.

Q You have made reference to meeting and talking with John Capra, is that correct?

A I had a conversation with him, yes.

Q Upstairs at that point in time?

A Yes.

Q And you also made a reference on the voir dire to the normal conversation that a lawyer has with a client in an arrest situation; is that correct?

A That is correct.

Q Any client.

A That is correct.

Q Can you tell the Court what the normal practice is that you have in an arrest situation with respect to

1
2 what you tell a client? Any client.

3 MR. SLOTNICK: May I indicate I believe the
4 testimony was he had some normal conversation with the
5 police officer? I don't recollect him saying with a client.
6 Now, if what he has with any client reflects upon what
7 he specifically said to Mr. Capra, I think I have a privileged
8 objection at this point and I make it.

9 MR. FEFFER: I am asking him very simply to
10 explain an answer that was elicited by Mr. McAlevy with
11 respect to his normal practice.

12 THE COURT: I know what you are asking.

13 First, what is the relevancy?

14 MR. FEFFER: It's very simple. If John Capra
15 was informed by his own attorney not to speak with police
16 officers, not to answer questions, then it almost becomes
17 irrelevant whether the police officers in fact gave
18 Miranda rights or warnings. That man had from his own
19 attorney --

20 THE COURT: No.

21 Objection sustained.

22 MR. SLOTNICK: Thank you, your Honor.

23 Q Did you have a conversation with John Capra
24 upstairs at that time?

25 A Yes, I did.

Q And how long did this conversation last?

A No longer than two minutes.

Q Was anyone else present during that conversation?

A No.

Q Where did the conversation take place?

A In the bedroom.

Q And then what did you do after that conversation?

A I proceeded to go downstairs and told Sergeant Gillespie that he'd be down in ten minutes.

Q You said he'd be down in ten minutes?

A Yes, sir, he'd be down in ten minutes.

Q In other words, you indicated to Sergeant Gillespie that Mr. Capra was upstairs. Is that your testimony?

MR. SLOTNICK: He's been asked the question and he's answered it.

THE COURT: Overruled.

A I don't think I said, "Capra is upstairs." I said, "He will be down in ten minutes." Gillespie saw me go upstairs and when I came down, I said, "He'll be down in ten minutes."

Q Did you tell Sergeant Gillespie you were going to speak to John Capra when you went upstairs?

MR. SLOTNICK: I object.

1
2 A No --

3 MR. SLOTNICK: Objection.

4 THE COURT: This becomes rather important to me
5 and if you keep jumping up and down and objecting and
6 postponing and delaying on what you know and I know is
7 sort of the heart of this credibility issue, it's going to
8 affect me in some way.

9 Overruled.

10 Please read the question.

11 (Record read.)

12 A I don't think I did in so many words.

13 Q The answer is "yes" or "no."

14 A The answer is "no."

15 Q And you are absolutely positive when you came
16 downstairs that you said to Gillespie and other people
17 that he would be downstairs in ten minutes. Is that your
18 testimony?

19 A Yes. I just looked at him and said, "He'll be
20 down in ten minutes." I might have said something else
21 because they asked me a few questions. I said that.

22 Q What happened after you came downstairs?

23 A I went into the kitchen and I told him what I
24 said I told him.

25 Then, a minute or two later, he said, "I've got

1 to go upstairs now." "Can't wait," he said.

2 I said, "Go ahead." I followed him upstairs.
3 That was it.

4
5 Q Did you make any effort to ask the officers
6 and agents to leave the household?

7 A Yes. When I initially came, as I said, I asked
8 him whether he had a warrant to arrest Capra. He said,
9 "No."

10 I said, "Do you have a search warrant?"

11 He said he did not.

12 At that point, I said, "Don't you think you ought
13 to leave? You don't have a right to be here."

14 I'm just repeating my testimony now. I said he
15 indicated to me he would call the New Rochelle police
16 department and bring two or three squad cars down and
17 turn the red lights on with the bullhorn and stuff like
18 that.

19 Mrs. Capra was very upset. I said, "Okay, you
20 don't have to do that. Stay."

21 Q You acquiesced to their remaining in the house-
22 hold; is that your testimony?

23 A Yes.

24 Q Who told you that they didn't have an arrest
25 warrant with them?

1
2 A I only spoke to Sergeant Gillespie.

3 Q What did he say to you?

4 A He said, "I don't have it with me but I could
5 get it from headquarters."

6 Q From headquarters?

7 A Yes.

8 Q Not from his car?

9 A No, not from his car. He said from headquarters.
10 Because I assume if he had it in his car he'd go get it.

11 MR. SLOTNICK: I'm not raising the issue as to
12 whether he had it with him or not.

13 THE COURT: Mr. Santangelo raised it with the
14 officer. I think it's irrelevant, too, and I have serious
15 question about why he told the officer, with an outstanding
16 indictment, which I have always thought was ample probable
17 cause for an arrest, that he couldn't arrest the man.

18 MR. SLOTNICK: I don't think that's what he said.

19 THE COURT: He said that "you're not supposed
20 to be here." That's what he said he said. He told
21 Gillespie that "if you don't have a warrant, you're not
22 supposed to be here."

23 Mr. Gillespie said he would get the bullhorns.
24 Then Mr. Santangelo said they can stay.

25 Q What happened after this?

1 A After what?

2 Q Well, you are downstairs now and you said that
3 the police officer couldn't wait, he went up the steps.
4 What did you do?

5 A I went upstairs with him.

6 Q And what took place?

7 A As we were walking up the steps, I knew he would
8 see Capra, so I turned to him and I said, "No questions.
9 You promise me you will ask him no questions and nothing
10 at all."

11 He said, "Okay, Counselor."

12 The other two gentlemen followed us up.

13 Q This police officer, realizing John Capra was
14 upstairs, walked up the steps, is that your testimony?

15 A Of course, he walked up the steps. He didn't
16 run up.

17 Q Did he have his gun drawn?

18 A No, sir.

19 Q He didn't?

20 A No, sir.

21 Q How long had that police officer been in the
22 household when you got there, if you know?

23 A I don't know of my own knowledge.

24 Q Did he tell you when you arrived at the household
25

1 he was waiting for John Capra to return to the house?

2 A Did he tell me?

3 Q Yes. Did anyone tell you besides Mrs. Capra?

4 A I was told they were waiting for Capra, yes.

5 Q And it is your testimony that suddenly finding
6 out that he's upstairs, that he calmly walked up the stairs
7 to locate John Capra; is that your testimony?

8 A No, that's not my testimony.

9 Q What is your testimony?

10 A My testimony is that when I came downstairs
11 I told him --

12 Q I'm talking about, Mr. Santangelo, when Officer
13 Gillespie went up the stairs.

14 A Officer Gillespie went up the stairs knowing
15 what he would find, John Capra.

16 Q Calmly walked up the steps, is that your testimony?

17 A That is correct.

18 Q Both of you conversing?

19 A That is correct.

20 Q What, exactly, did you tell the officer going
21 up the steps?

22 A As we were walking up the steps, I turned to
23 him and I said, "Look, when you see him there and you
24 arrest him, no questions. I don't want him asked any
25

questions."

He said, "Okay."

That's it.

Q Where did this conversation take place?

A While we were going up the steps.

Q On the steps?

A Yes. It's a very wide stairway. We were going up the steps together. I didn't want him up there alone with Capra and I walked up with him. The two other agents followed.

Q What took place when you reached Capra?

A Nothing. I walked in first. He was at a vanity or whatever combing his hair at the time, or he was inside the bathroom shaving; I forget.

Q What was he doing, shaving or combing his hair?

A I forget.

MR. SLOTNICK: I object to the question. I think it's petty.

THE COURT: Overruled.

A I've forgotten. Either shaving or combing his hair because they allowed him to finish whatever he was doing and at one point in time my recollection is very clear, he was in the bedroom combing his hair. Gillespie was standing there. The other two agents were standing

there. No guns were drawn. They had a slight exchange, "Hello, John, we're here to arrest you." He turned around and said, "Okay."

Q Was this in the bathroom or the bedroom?

A In the bedroom because he eventually came out to the bedroom to comb his hair.

Q I'm talking about when you first saw him.

A That I'm not sure of, Mr. Peffer. I'm not sure whether he was in the bathroom when we came up there, shaving with his electric razor or when I came in he was in the bedroom combing his hair. My full recollection is the last point in time with him combing his hair and Gillespie standing in the bedroom at the doorway, maybe to or three feet inside the doorway.

Q When you reached the top of the steps walking with the officer, where did you go?

A I went right into the bedroom.

Q Was Mr. Capra in the bedroom?

A At that point I think he was shaving in the bathroom or I saw him at the bureau. I forget.

Q It is your testimony he was either in the bathroom shaving or coming his hair in front of the mirror in the bedroom; is that correct?

A Yes. It didn't seem important to me at the time

where he was standing so there is no picture in my mind.

Q Didn't Officer Gillespie go into the bathroom?

A No, he never got into the bathroom.

Q Did he go to the door of the bathroom?

A No, he didn't. He was very quiet, very respectful.

Q Did he open the door to go in the bathroom?

A No, he never did.

Q Where is the bathroom in relation to the bedroom?

A The bedroom is about from where I'm sitting to that wall. The length, I think, is the length of this room.

Q That is the length of the bedroom?

A A little longer, maybe. The door is at one end and the bedroom is all the way at the other end. So he'd have to walk about thirty feet to get to the bathroom. He never did that.

Q You are saying that the bathroom was approximately thirty feet from the bedroom; is that your testimony?

A I said the bathroom is about thirty feet from the door.

THE COURT: You didn't lay a foundation. The bathroom, I'm beginning to learn, adjoins the bedroom; is that right?

THE WITNESS: Yes.

Q What took place in either the bathroom or the bedroom or wherever you may have been?

A Well, I walked into the room. I remember I walked into the room first; that I'm sure of.

Q Which room?

A The bedroom. At that point I don't recall whether Capra was in the bathroom or outside. I'm sorry. I can't recall that. But at no point did Sergeant Gillespie enter the bathroom.

Q I'm not asking you that. I'm asking you what happened in the room when you got there.

A Oh. Well, Capra knew he was going to be arrested --

Q I didn't ask you what Capra knew. I'm asking what you did.

MR. SLOTNICK: I ask counsel not to shout at the witness.

THE COURT: Well, lawyers sometimes make tough witnesses and I must say he is not answering the question.

Please read the question.

And, Mr. Santangelo, please answer it.

MR. FEFFER: Very simply.

THE COURT: I want to have the question read

and I want it answered.

(Record read.)

THE COURT: What happened when you entered the room?

A Gillespie walked in. I walked in the room. I must have been about five feet from Capra and Gillespie walked in and said, "We are placing you under arrest, John." Either "John" or "Capra," I don't know which.

Capra didn't even turn. He just stood there combing his hair. When he finished he put the comb down. They walked out of the room and downstairs. Capra asked Gillespie whether or not he could get some orange juice. I don't think Gillespie answered.

He went and got it. Gillespie waited in the kitchen with it and then he said, "Okay, let's go." Then he walked to the door, which was twenty feet from the kitchen. At that point he cuffed him.

Q You walked into the bedroom first; is that correct?

A Yes, I walked in first.

Q Capra was standing there combing his hair.

A Combing his hair.

To go back again and repeat, he may have been in the bathroom shaving and came right out when we walked in.

2 Q After you got downstairs and after Mr. Capra
3 had the orange juice, what did the officers do with John
4 Capra?

5 A He said, "Okay, let's go."

6 I remember I was having orange juice; that's
7 why I didn't go to the door with him. When they got to
8 the door they cuffed him there. They opened the door,
9 another agent came from the outside, stood on both sides
10 of Capra and they walked out.

11 Q You were drinking orange juice at that time?

12 A Yes, I was. I was drinking it in the kitchen.

13 Q Did you remain in the kitchen drinking orange
14 juice, yes or no?

15 A Yes, for --

16 Q That's the only question I asked, Mr. Santangelo.
17 Mr. Capra left and you couldn't see him at
18 that point, is that correct?

19 A The door was open. I saw them outside. The
20 door doesn't have a swinging hinge so when you open it it
21 stays open.

22 Q From the kitchen where you were drinking your
23 orange juice, you could see Mr. Capra leaving?

24 A Yes.

25 Q And he left?

1 A They walked out onto --

2 Q Do you know where he went?

3 A Of course, I know where he went.

4 Q Where did they go?

5 A Walked out onto the porch.

6 Q Then what?

7 A At that point I saw flashing bulbs. Then he
8 walked off the porch, walked to the car, got in the car
9 and left.

10 Q Now, when he got to the car, where were you?

11 A I was halfway between the porch and the car. As
12 a matter of fact, there is a newspaper clipping from the
13 News which shows me there.

14 Q What is the distance from where you were standing
15 to the car, approximately?

16 A Twenty-five feet.

17 Q Twenty-five feet?

18 A Twenty feet, twenty-five feet. I said halfway.
19 It's fifty feet from the porch to the car and I walked
20 half the distance on the walk.

21 Q Was it dark?

22 A No, it was light.

23 Q It was light?

24 A Yes.

1
2 Q And could you see into the car from where you
3 were standing?

4 A Could I see into the car?

5 Q Yes.

6 A Not really.

7 Q Where was Capra when you were twenty-five feet
8 from the car?

9 A Where was he? He was ducking his head, trying
10 to get into the car with the cuffs. They had trouble
11 getting him into the car with the cuffs on because he had
12 to duck his head and balance himself and step off a curb
13 at the same time.

14 Q Where was Gillespie?

15 A I believe Gillespie was right behind him.

16 Q You "believe"?

17 A I believe.

18 This kind of testimony, I can't say that
19 Gillespie was directly behind him. I believe he was.

20 Q But you can say positively that Gillespie didn't
21 read him his rights; is that correct?

22 A I don't say positively. I didn't hear it done.

23 Q You didn't hear it?

24 A No, sir.

25 Q And you didn't see it; is that correct?

1 A Well, for what it's worth, I was twenty feet
2 away and I didn't hear this go on.
3

4 Q You couldn't hear any conversation at that car,
5 is that correct, from twenty-five feet away?

6 A I didn't hear anything said, no.

7 Q What did you do next?

8 A I got in my car and left.

9 Q Did you try to talk to Capra at the car?

10 A No.

11 Q So you didn't go to the automobile in which Capra
12 was; is that correct?

13 A I couldn't get to the automobile.

14 Q Why?

15 A There were six agents standing there, eight
16 agents standing there.

17 Q How many agents standing there?

18 A Two carloads of agents.

19 Q Carrying shotguns, right?

20 A One or two of them had shotguns there, I believe.
21 There were pistols.

22 Q Is it your testimony --

23 THE COURT: Mr. Feffer, don't yell.

24 Q Is it your testimony that there were agents
25 outside the Capra household at that point in time with

shotguns?

A You know, Mr. Feffer, I saw so many shotguns in this case that I believe shotguns -- every time I looked I saw a shotgun. If I could say I saw shotguns at that time, I don't know. I saw guns at that time.

Q Did anyone bar you from going to the car in which Capra was?

A Nobody barred me, no.

Q From twenty-five feet away, where did you go at that point?

A I took the sidewalk, which is the crosswalk between the front walk and the sidewalk, and went to my car which was parked on the side of the house.

Q And went home?

A Went home to get dressed.

Q You went to sleep?

A I didn't go to sleep.

Q What did you do next?

A Had a cup of coffee.

Q In terms of this case.

A Got dressed and I went downtown.

Q Where did you go?

A 57th Street.

Q Where did you go when you got to 57th Street?

1 A Right into the lobby.

2 Q What time was this?

3 A 9:30, twenty after 9:00; something like that.

4 Q What is in the lobby of the building at 57th
5 Street? Are there any stores there?

6 A I recall -- let me get the perspective now. I
7 walked in on the 58th Street side, so that when you walk
8 into the building, on the left-hand side, about twenty
9 feet, as you walk in, there was a building employee
10 in uniform and he was sitting there watching a television
11 set.
12

13 Q A building employee?

14 A He was in a uniform. He wasn't a city police
15 officer.

16 Q Did he have a shotgun with him?

17 A No, he didn't. He was watching a television set.
18 It was a monitoring set.

19 THE COURT: Let's plan a recess as soon as you
20 can break. Is this all right?

21 MR. FEFFER: Fine.

22 THE COURT: Let's take about ten minutes.

23 (Recess.)
24
25

rdrl

Santangelo-cross

403

Q Mr. Santangelo, can you tell us the names of the people, if you recollect them, who were in the Capra household when you arrived?

A No. I never got any names and I never asked for any. I just asked Sgt. Gillespie who the gentlemen were, that's all.

Q Did Mr. Gillespie tell you that one of the people present was with the New York Daily News?

A No, sir.

Q And you had no idea when you were in the house that anyone was with the Daily News; is that correct?

A No, sir.

Q And your testimony is when you came out of the Capra household that there were approximately how many agents and officers present?

A I didn't count them. I say several, several meaning four, five, six. There were two carloads of people.

Q And your best recollection is they had shotguns, is that correct?

A My best recollection is I saw guns and I saw shotguns. I saw a lot of weapons outside.

Q So, in other words, they were standing out on the lawn or the area with shotguns and guns?

1
2 A No. When I came out of the house I saw
3 agents standing around the cars, behind the cars,
4 on the side of the cars out in the street, in front of
5 the cars.

6 Q You spoke with your client for how long,
7 approximately, in the household?

8 A When I went upstairs the first time I spoke
9 to him for about two minutes.

10 Q Did any one prevent you from speaking with
11 your client when you were having orange juice with him
12 in the kitchen?

13 A No, no one prevented me from speaking with
14 him.

15 Q And you went to the Bureau of Narcotics
16 with your client again, is that correct, about 9 o'clock
17 in the morning?"

18 A About 9:30, quarter to ten.

19 Q You went in through the 58th Street side
20 of the lobby?

21 A I walked in through the 58th Street side.

22 Q Can you describe the lobby of that building?

23 A Yes. There are banks of elevators on the
24 righthand side as you walk in the 58th Street entrance.
25 On the lefthand side there are, as I recall, telephone

rdr3

Santangelo-cross

booths. I think there was one telephone that I used. I don't know whether there were three or four booths. It was an open phone. I don't recall it being an enclosed phone. And right outside of that telephone booth this uniformed gentleman was sitting there. He might have been an employee of the building, with a television screen.

Going up further to the left there is the -- there are automobiles. There is a showroom, more or less. On the righthand side towards the 57th Street entrance I think there is another showroom. As you come up on the righthand side towards the 58th Street entrance there are banks of elevators, maybe two or three banks. I'm not sure.

Q Was the showroom open for business when you arrived?

A I don't think so. I didn't check that.

Q Is it your testimony there were agents standing around with shotguns in that lobby?

A Oh, yes.

Q When you got there at 9 o'clock?

A When I got there at 9:30.

Q How about 11 o'clock, when you returned, where there agents standing with shotguns?

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Santangelo-cross

406

A When I got there then I didn't see that kind of activity.

Q Did you see any agents with shotguns?

A No, sir. There were two agents at a long table in front of one of the banks of elevators which went to the 18th or 19th floor.

Q Now, you indicated that a Mrs. Sperling was arraigned Saturday morning, is that correct?

A Yes, as I discovered subsequent to that date.

Q Do you know of anybody else who was arraigned that morning?

A No, sir, I don't know of anybody else.

Q And you have also testified to making numerous requests of agents to see your client, is that correct?

A Yes.

Q Now, Mr. Santangelo, how long have you been practicing criminal law in New York City?

A I've been practicing law for 13 years.

Q And how many cases have you had in the Southern District of New York?

A 20, 25, something like that.

Q Have you had clients who had previously been arraigned on Saturday morning in the Southern District of New York?

rdr5

Santangelo-cross

MR. SLOTNICK: I object. I think the Court can take judicial notice of the fact that happens.

THE COURT: Let me hear what is coming out. Nothing prejudicial so far.

A I don't honestly recall whether I've had a client arraigned on a Saturday morning.

Q But you are aware of the fact that there are defendants who are arraigned in this courthouse on a Saturday morning; is that correct?

A Yes, sir.

Q You are aware of the fact that there is a magistrate available on a Saturday morning?

A Yes, sir.

Q And aren't you also aware of the fact there is an Assistant U. S. Attorney in this building on Saturday morning?

A Yes.

Q Did you make any effort to call that assistant U. S. Attorney?

A I made an effort to talk to an assistant U. S. Attorney at the 57th Street building.

Q You are saying you tried to speak to an Assistant U. S. Attorney at 57th Street?

A Yes.

1 rdr6

Santangelo-cross

2 Q Mr. Santangelo, did you telephone the U. S.
3 Attorney's office and ask to speak to the Assistant U. S.
4 Attorney who was in charge that morning?

5 A At Foley Square?

6 Q Yes.

7 A No.

8 Q Did you come down to the U. S. Attorney's
9 office and make any attempt to locate the assistant who
10 was on duty that morning?

11 MR. SLOTNICK: I object, your Honor. I
12 think that for the purpose of this hearing we are getting
13 into an area where the government is attempting to shift
14 the burden that is properly theirs. They are anticipating
15 my argument. I object to the question as not being
16 germane.

17 THE COURT: Overruled.

18 A Did I attempt to call a United States Attorney
19 at Foley Square?

20 Q Did you come down?

21 A No.

22 Q So you made absolutely no effort, is that
23 correct, to contact the U. S. Attorney's office with
24 respect to seeing your client that morning, is that
25 correct?

rdr7

Santangelo-cross

A That is not correct.

Q What did you do with respect to communicating with the U. S. Attorney's office Saturday morning?

A I called the 57th Street building four times and asked to speak to the Assistant United States Attorney in charge and was told he wouldn't speak to me, that's it.

Q Did you make any effort, Mr. Santangelo --

A Yes.

Q Let me finish the question.

THE COURT: He didn't call here. He called there. You may argue later whether a lawyer of his experience, if he wanted to speak to a U. S. Attorney would call here.

MR. FEFFER: Fine, your Honor. No further questions.

MR. SLOTNICK: May I, your Honor?

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. SLOTNICK:

MR. SLOTNICK: May I have these exhibits marked for identification?

(Defendants' Exhibits E, F, G and H were marked for identification)

MR. SLOTNICK: I would ask the government, your

rdr8 Santangelo-redirect

Honor, to stipulate that Defendants' E, F, G and H marked for identification are a fair representation of what took place on the morning of April 14, 1973, specifically the photographs in front of John Capra's home.

MR. PEPPER: Your Honor, is that limited to E, F and G?

MR. SLOTNICK: That's limited to E and F. G and H have to do with in front of West 57th Street.

MR. PEPPER: Your Honor, there is only one portion of F which pertains to John Capra. The rest of them are on the photographs on the top of the page which have nothing to do with John Capra. The government would have no objections to E, but it would have objection to F as having no bearing on this particular proceeding.

THE COURT: Well, nothing on F relates to Capra?

MR. PEPPER: Just that portion. There is one portion that does. The government would not object to that.

THE COURT: Okay. You don't want anything else, do you, Mr. Slotnick?

MR. SLOTNICK: No, your Honor. There is no jury and I trust your Honor to not look at what is not circled in red on that page.

xxx
(Defendants' Exhibits E and F received in evidence.)

Q Mr. Santangelo, look at Defendant's Exhibit E and indicate what that is.

A That's a picture of the outside, the portico of Capra's residence, and it's a picture of John Capra in handcuffs, with his hands behind his back, and Sergeant Gillespie to his left or to his right. And the other individuals, I'm not sure who they are.

Q Do you see yourself in that photograph?

A No, sir.

MR. SLOTHICK: May I ask the Court to peruse the photograph?

THE COURT: Surely. All right.

Q I show you Exhibit F and would you describe what is circled? Describe the photograph in Exhibit F.

A That looks like the time where Capra was entering the vehicle outside the Capra residence in cuffs and attempting to get into the back door of the motor vehicle.

Q That's a photograph of Capra entering the vehicle with Gillespie?

A Gillespie to his right and another agent, I assume, to his left.

Q Do you see yourself in that photograph?

1
2 A Well, I see another individual behind the
3 individuals I described. I was wearing a blue jacket.
4 Whether or not that is me, I can't be positive.

5 Q How far is he from the automobile?

6 A Well, using my judgment in terms of perspective
7 of the pictures and my knowledge of the house and layout,
8 bushes and shrubs, I'd say about twenty feet.

9 MR. SLOTNICK: Your Honor, I would suggest
10 the following: This appears -- if there is no objection
11 to my making a statement, there being no jury here -- this
12 appears to be a cropped picture. I will endeavor to call
13 Mr. Stahl and ask him to present us with the full picture.
14 It may resolve the complete issue as to where Mr.
15 Santangelo was at the time Mr. Capra was placed in the
16 automobile. I would ask the Court to look at this exhibit
17 at this time and we hope to replace it with the actual
18 exhibit.

19 THE COURT: All right. Go ahead.

20 MR. SLOTNICK: With regard to Exhibit G will the
21 Government stipulate that is a fair and accurate represen-
22 tation of one of the events occurring on the morning in
23 front of West 57th Street? The morning of April 14th?

24 MR. FEEFER: I can't stipulate to that, your
25 Honor. I can't tell from this picture on what date it took

place or anything.

THE COURT: All right. I don't see how they can be expected to stipulate to what is a fair representation of something that, so far as I know, they never saw anyhow.

MR. FEFFER: I wasn't there myself to personally observe it.

Go ahead.

Q I show you Exhibits G and H for identification.

MR. FELD: May we have the record corrected, your Honor? He called the witness Mr. Capra.

MR. SLOTNICK: I'm sorry.

Q I show you Exhibits G and H for identification, and ask whether the shotguns, as you view them in those photographs, are a fair and accurate representation of similar shotguns to the ones you saw on the morning of April 14th at BNDD headquarters.

A Yes.

MR. SLOTNICK: I would move these exhibits, only for the purpose of showing agents with shotguns, be received into evidence.

MR. FEFFER: Objection as to the admissibility of these pictures for any purpose?

THE COURT: Sustained.

1 MR. SLOTNICK: Thank you very much.

2 MR. FEFFER: No further questions.

3 THE COURT: All right. Thank you, Mr. Santangelo.
4 (Witness excused.)

5 THE COURT: All right.

6 Is the Government ready to proceed?

7 MR. FEFFER: Yes, your Honor.

8 The Government calls Michael Waniowski.

9 (Pause.)

10 MR. FEFFER: He appears not to be out in the
11 hallway, your Honor. He was out there for most of the
12 morning. He is working in another trial in this courthouse
13 as a witness, and it's possible he may have been called
14 to Courtroom 318. An officer just went out to check on
15 that.

16 THE COURT: All right. You haven't been using
17 the witness room, or nobody has?

18 MR. FEFFER: Most of the witnesses have been
19 standing in the hallway, so far.

20 THE COURT: While we are waiting for him, Mr.
21 Feld, what is the status with Mr. Morris and the problem
22 of handwriting exemplars?

23 MR. FELD: I understood, your Honor, from my
24 conversation with Mr. Feffer, after he had spoken with
25

yesterday, that defendant Morris still refused to comply with the Court's order and that he was demanding a jury trial.

THE COURT: A jury trial of what?

MR. FELD: I don't know, your Honor. But that's --

THE COURT: Do you have any application at this time or not?

MR. FELD: Well, your Honor, I have taken a look at the case law. There was a recent case by the Court of Appeals of this Circuit in Marra last July which seems to indicate that a summary contempt under Rule 42(a) is applicable only in the very limited kind of circumstances where there is an overt, deliberate act of disrespect towards the Court and attacking its dignity, et cetera. They said that Rule 42(a) contempt was inapplicable for refusal of a witness to testify at a trial after having been granted immunity. They said the proper procedure would be to proceed under Rule 42(b), which requires notice and hearing, at least on its face.

There is a limitation, I understand, insofar as the punishment that can be imposed under Rule 42(b) in that if the punishment is going to exceed six months the defendant has a constitutional right to a jury trial.

1
2 If the punishment is less than six months, then he has no
3 right to a jury trial unless a special statute confers
4 that right upon him, which I don't find to be the case
5 in this particular situation here.

6 Accordingly, the Government's application would
7 be at this time to have the defendant Morris cited for
8 contempt under Rule 42(b) and that the Court impose punish-
9 ment of six months or less.

10 MR. STONE: Your Honor, I would ask that you
11 reserve your ruling on this application until you have
12 made other rulings concerning the application of other
13 defendants for the suppression of physical evidence and
14 for the suppression of certain oral statements.

15 Mr. Morris may be further advised as to his
16 legal position at that time, depending upon your rulings,
17 and what I think the posture of the case will be. I don't
18 think the Government will be prejudiced by waiting until
19 the other rulings are made and I think that Mr. Morris
20 may have the benefit of additional advice at that time.

21 THE COURT: Well, let me ask this, Mr. Stone:
22 Is Mr. Feld correct in his report that Mr. Morris, through
23 you as his counsel or otherwise, demands a trial by jury
24 of this charge of contempt?

25 MR. STONE: I think his right to a trial by jury

would only come about if the Government were asking for more than six months. I feel that he is certainly entitled to a hearing by the Court alone if the Government is not asking for more than six months, and the Court realizes that position.

THE COURT: I may want to refer this to another judge or try it myself, but I don't think that the Government's view is acceptable, as the Court is to be concerned with the enforcement of its order, which we are concerned with, I don't see any reason why a man in the position of Mr. Morris should be proceeded against by a procedure which limits the Court's power to judgment of six months' imprisonment.

In his special circumstances, as I understand them, I don't think that that's a very forceful means of implementing a Court's order. If he wants a jury trial, I certainly think that if there is any right to it, he should have it, although I don't know what there is to try, maybe questions of wilfulness. I think that if the picture is as it has been given to me and he defies the Court's order, he ought to be confronted with the possibility of a sentence more severe than six months' imprisonment.

I don't understand your position, Mr. Feld.

1
2 MR. FELDMAN: Well, your Honor, under Title 18,
3 Section 401, the Court does have unlimited discretion
4 with respect to punishment for contempt of Court. I think
5 that fact is perfectly clear.

6 My concern here, your Honor, and this is a special
7 instance where we have a defendant who is incarcerated
8 on another charge and we need the handwriting examples
9 for purposes of a trial which is about to commence on
10 October 15th. It is of no use to the Government for
11 purposes of that proceeding, your Honor, to have a possible
12 jury trial after this case is over.

13 The Government is quite prepared, if it wants
14 a jury trial, and we will go that route. My only concern
15 is that it not be -- for the Government's purpose in
16 connection with this case, whether that course would be most
17 useful to us.

18 THE COURT: I understand that but I have been
19 given the impression that Mr. Morris is not likely to find
20 the threat of six months' imprisonment very persuasive
21 in this situation. It seems to me it ought to be entirely
22 possible to organize a brief jury trial well before
23 October 15th and that the power of the Court to enforce
24 its orders and to punish disobedience of them ought not
25 to be hobbled in this fashion.

1
2 I direct you to draw up a form of notice that
3 recites the things that you know about. I direct Mr.
4 Stone to consult with you as to the adequacy of the notice
5 and to offer any improvements or corrections required to
6 give full notice to his client, and then I will sign the
7 notice and the problem of scheduling the trial with all
8 possible speed I will handle the best way I can, possibly
9 by consulting one of the emergency judges -- the emergency
10 judge or by fitting it into my own calendar because I
11 don't think there is very much here to try. But whatever
12 there is to try in the way of issues of fact we will put
13 to the jury in the usual way. So let's get that out by
14 tomorrow.

15 I have not ignored, Mr. Stone, but I am overruling
16 your suggestion that we ought to delay. I don't see any
17 earthly reason for delay at all. It seems to me to be
18 wholly prejudicial to the Government and to the Court to
19 delay a matter of this kind any further than we have
20 delayed it.

21 MR. STONE: I think a handwriting analysis can
22 take place in less than a week with a full report and that
23 Mr. Morris should certainly receive the advice of his
24 attorney based on the complete status of where the case
25 is. I would be better able to advise him after you have

made certain rulings.

THE COURT: You mean better able to advise him as to whether he ought to obey the order of the Court?

MR. STONE: Let's say I may be able to paint a picture to him of where he stands in a case much better after you rule.

THE COURT: I don't find anything in that general statement that is material. I don't understand it at all. Is there any basis on which you expect that you will find some ground for his defying the order which has been issued to him directly?

MR. STONE: No, but I may find a basis for him to change his mind, your Honor, and comply with the order which would avoid a jury trial and I think would accomplish the Government's purpose and would be of service to Mr. Morris.

THE COURT: If you can find it before I find this notice, bless you. I would hope you do that. But we are not going to wait. If then, heaven forbid, you fail, we will be right back where you were except we will have incurred an additional delay which hasn't profited us.

No, I want the notice prepared and I will sign it and we will set the matter down for trial under the statute.

1
2 MR. FEID: Very well, your Honor.

3 MR. SLOTNICK: Most respectfully, your Honor,
4 with regard to that point, the other day someone mentioned
5 the JDL case, U.S. vs. Huss. In that proceeding I also
6 sat a chair number one and did some reading and learning
7 about the contempt procedure. It is my understanding that
8 the legislature when they passed the statute with regard
9 to contempt indicated that the judge must first resort to
10 civil contempt, and that's the route that Judge Bauman
11 did take in that matter. Judge Bauman is a thorough expert
12 at this point on the civil-criminal contempt dichotomy.
13 That's the procedure that he did adopt at that time,
14 because I believe that the first contempt that has to be
15 installed against the defendant, and this was over my
16 objection, was the fact that the Court must be coercive,
17 the judgment of the Court must be coercive. That's the
18 civil contempt. Thereafter, if the United States Attorney so
19 desires, I believe, and information is drawn or an order
20 to show cause is drawn and then it's sent back to the
21 wheel and the judge is picked and the choice of the jury
22 trial or nonjury trial would first depend upon the
23 United States Attorney, if he decided to sentence him to
24 six months and the judge so agreed. If not, there would
25 be a demand for a jury trial.

1
2 So the order may be premature at this state.

3 THE COURT: I appreciate the suggestion.

4 As I understand the facts, Mr. Morris is beyond
5 the power of the Court to punish for civil contempt right
6 now. I can't order him incarcerated twice. He is already
7 in jail serving a sentence and it appears to me that
8 it would be a futility.

9 What is your view on that, Mr. Slotnick?

10 MR. SLOTNICK: It was my understanding that Mr.
11 Morris was remanded as a result of a matter that appeared
12 before your Honor. If your Honor would vacate that remand
13 he would then lose the credit for the period of time he
14 is serving for the civil contempt.

15 THE COURT: I thought he was here on a writ.

16 MR. FELD: Yes, your Honor. He was here on a
17 writ.

18 THE COURT: Now that you have the facts straight,
19 what does your imagination suggest? He is in jail, quite
20 apart from any order I have ever made, and he is going
21 to stay there quite apart from anything I may do, good or
22 bad, to him.

23 Now, if I find him in civil contempt, it seems
24 to me the most I can say is he really should be in jail,
25 which he is.

1
2 MR. SLOTNICK: It's a great dilemma.

3 THE COURT: Help me out since you volunteered
4 and I appreciate it.

5 MR. SLOTNICK: The framers of the statute were
6 not really cognizant that such a situation could occur
7 and I haven't found an answer to it, nor have been confronted
8 with that. I'm sure under correctional procedures there
9 is no question the defendant is being credited for whatever
10 time he is serving in jail elsewhere. I don't know whether
11 that is correct. I think we need an expert from the
12 Department of Correction.

13 THE COURT: He is serving a term for some other
14 jurisdiction.

15 MR. SLOTNICK: Is that state or federal?

16 THE COURT: What is he under, an Ohio judgment?

17 MR. FELD: Yes, and also under a Detroit,
18 Michigan state court judgment, federal court judgment in
19 Michigan.

20 THE COURT: Is that right, Mr. Stone?

21 MR. STONE: That's my understanding, your Honor.
22 That is correct.

23 MR. SLOTNICK: I would suggest, your Honor, to
24 be perfectly candid, I read the statute as indicating there
25 is a mandate on the court to first impose a civil contempt.

1
2 I understand your Honor's logic saying, what does a civil
3 contempt mean? He is in jail anyhow.

4 It's something that needs research and review.

5 THE COURT: It may give the Circuit power to
6 release its imagination again. I can't think of anything
7 to do in the nature of civil contempt in these circumstances
8 so I'm not going to waste any more time with it.

9 That doesn't mean your suggestion is a waste of
10 time and I quite earnestly repeat that I want any help
11 anybody can give me on this subject.

12 We are going to go forward, I think, with the
13 criminal contempt.

14 MR. SLOTNICK: May I make one last suggestion,
15 your Honor?

16 THE COURT: Yes.

17 MR. SLOTNICK: I know that Judge Bauman and his
18 law clerks were inundated by briefs on this point and
19 are sufficiently well aware of the problems in this area.

20 THE COURT: I appreciate that.

21 MR. STONE: I perhaps would appreciate some
22 assistance. Mr. Slotnick has obviously tried a contempt
23 case. I don't think there are that many lawyers who have
24 tried that many criminal contempt cases under Rule 42(a)
25 or (b). Accordingly, I may very well not be prepared to

1
2 try this case in the next two days or three days or one
3 week. I certainly should have the opportunity to discuss
4 it with other lawyers who have tried cases and do some
5 research on the issues.
6

7 THE COURT: Well, your client has been steadfast
8 in his determination to be in contempt for some time. I
9 would have hoped you would have been girding yourself
10 for the upcoming problems. But you had better spend some
11 evenings in the library because this is not a matter
12 on which we can take all the time we want.

13 MR. STONE: I certainly didn't have any more
14 notice up until Thursday.

15 THE COURT: Let's not cross any other bridges.
16 It's a subject on which none of us is terribly learned.

17 On the other hand, this particular case does not
18 seem very complicated. The man has been ordered to do
19 something that under the law he is required to do. He has
20 refused because of a construction of his rights, which I
21 have been advised in open court, nobody supports. He does
22 not have the advice of counsel to take shelter in, and I
23 don't think any responsible lawyer could give such advice.

24 On the other hand, he has the advice of the Court,
25 for what that is worth, with his own lawyer and the
Government's lawyer telling him what the higher courts have

quite plainly said and telling him what the consequences of disobeying are, and that's it. That's not much of a case.

If he has some state of mind that affects the question of wilfulness and he would like to put that to a jury, that certainly is his right if we proceed under the statute. All we are going to do is extend him that right. I don't think that involves any abstruse questions of law, that is, the trial of this issue. But if it does, and we can get a judge quickly to consider it, as I hope we can. that can be put to him.

Are we ready?

MR. SLOTNICK: For the sake of the record, and because I relied on U.S. vs. Huss, et al., I did not try the contempt case. By the wisdom of the Court of Appeals that was short-circuited as to Siegal. In the other cases there have been two, and one have been tried yet.

MR. FEFFER: The Government calls Robert Allen.

R O B E R T A L L E N, called as a witness
by the Government, being first duly sworn, testified
as follows:

DIRECT EXAMINATION

BY MR. FEFFER:

Q Mr. Allen, by whom are you employed?

A Employed by the Department of Justice, Drug Enforcement Administration.

Q I want to direct your attention to April 14, 1973. Did you and other people associated with the Drug Enforcement Administration and the New York City Police Department receive instructions to arrest a John Capra?

A Yes, we did.

Q Now, pursuant to those instructions, did you go to the household of Mr. Capra on the morning of April 14th?

A Yes, I did.

Q What took place at that time?

A I believe we arrived in the vicinity about 1:00 p.m. We noticed that there was no cars in or around the house. We maintained surveillance there until approximately 5:00 o'clock. Between 5:00 and 5:30 there was a telephone call made into -- at a telephone number that supposedly belonged to Mr. Capra. A male answered, and at that time we was advised to go into the house, see if Mr. Capra was at the house.

Q Did there come a time when Mr. Capra was brought out of the household under arrest?

A Yes, sir.

Q What took place from that point on?

A I believe it was Detective Gillespie and Detective

1 rdmch.

Allen-direct

428

2 DeMarco walked out of the house with the defendant, Mr.
3 Capra, and put him in their car. I got into my car. I
4 was about to pull off and I went up forward, talked to
5 Mr. DeMarco -- Detective DeMarco. He said that he wanted
6 to read the rights to Mr. Capra. At that time I produced
7 a BNDD 13-A, and they used that card to read his rights.
8

9 Q Do you have that card with you?

10 A Yes, I do.

11 Q Can you produce it, please?

12 A Yes (handing).

13 (Government's Exhibit No. 4 marked for iden-
14 tification.)

15 MR. SLOTNICK: May I voir dire the agent, your
16 Honor?

17 THE COURT: As to what, admissibility?

18 MR. SLOTNICK: As to whether this was the actual
19 card he gave to Sergeant DeMarco.

20 THE COURT: Was it, Mr. Allen? Is that the very
21 same card that you gave to Mr. DeMarco?

22 THE WITNESS: Yes, it is.

23 MR. SLOTNICK: No objection.

24 (Government's Exhibit No. 4 received in evidence.)

25 Q Who was in the car with Mr. Capra when the rights
were read to him?

1
2 A There was Detective DeMarco, Detective Gillespie.
3 It was Detective Gillespie who read the rights. There
4 was another police official -- correction, I don't know.
5 Those were the only three that I remember.

6 Q When the rights were being read, these people
7 were in the car; is that correct?

8 A That is right. They were in the car. I was
9 outside the car leaning into the car so I could hear what
10 was going on.

11 MR. FEFFER: I have no further questions.

12 MR. SLOTNICK: Your Honor, I would ask at quarter
13 to the hour I have a lunch break because I'm missing
14 Exhibit F.

15 I'm not missing it any more, your Honor.

16 CROSS-EXAMINATION

17 BY MR. SLOTNICK:

18 Q On April 14, 1973, you were officially with the
19 Bureau of Narcotics and Dangerous Drugs?

20 A Yes.

21 Q Which has now changed its name to DEA.

22 A Yes.

23 Q Drug Enforcement Administration.

24 Now, what is your exact position?

25 A Special agent.

1 Q Special agent.

2 And you received orders to arrest the defendant
3 Capra on the evening of April 13, 1973; is that correct?
4

5 A Yes, sir.

6 Q About what time did you receive these orders?

7 A It was late in the evening.

8 Q About what time?

9 A About 11:00 o'clock, 10:00 o'clock. Between
10 10:00 and 11:00.

11 Q Did you know you were going to work the evening
12 of April 13, 1973?

13 A Yes, we did.

14 Q When were you informed of that fact?

15 A I had been informed several weeks -- approximately
16 a week ahead of time.

17 Q That on April 13, 1973, you would have to work
18 possibly late in the evening and effectuate arrests?

19 A I didn't say that. I said we were told we would
20 be working that evening the whole week. Normally I work
21 nights.

22 Q Who told you that?

23 A I was told by my group supervisor.

24 Q What is his name?

25 A Group Supervisor, Mr. Becknar.

1
2 Q He told you you would be working the evening
3 of April 13, 1973?

4 A Yes.

5 Q When he told you that a week prior thereto, did
6 he indicate that you were to report to any special place?

7 A He said we would be working in the Chinatown
8 area.

9 Q Did he indicate to you what special paraphernalia
10 he wanted you to bring on that day?

11 MR. FEFFER: Objection to this whole line of
12 questioning.

13 MR. SLOTNICK: The reason I'm asking for the ans-
14 wer is the point I placed before the Court, that the
15 Government or the agency or someone should have made
16 arrangements to have a magistrate available, knowing well
17 in advance that these arrests were to take place and that
18 one of the objections that I have is to Mr. Capra's late
19 arraignment.

20 THE COURT: His late arraignment?

21 MR. SLOTNICK: That is correct, your Honor.

22 THE COURT: The statement in question was taken
23 about 9:00 a.m., is that correct?

24 MR. FEFFER: In the morning, that is right.

25 THE COURT: He was taken out of his house about

6:30P

MR. PEPPER: I believe that's the testimony, your Honor. That is correct.

THE COURT: Your record is sufficient on that, Mr. Slotnick. I'm going to overrule that contention and I think you ought to proceed.

MR. SLOTNICK: If there comes a time when the Court questions the credibility of the statement being made that early in the morning, may I come back to that issue?

THE COURT: Let's see. Let's not do it hypothetically.

Q What time did you arrive at 57th Street on the evening of April 14, 1973?

A Approximately 9:30.

Q And where did you report to?

A We were told to report to the 18th floor conference room.

Q When you say "we," who is "we"?

A The agents in my group.

Q How many agents are there in your group?

A Approximately ten.

Q About ten.

And you were told to report to a conference room.

Did you so report?

A Yes.

Q And what happened then?

A Well, we were told that there would be an operation that night and we would be working with the detectives and sergeants from the New York Police Department in the apprehension of a number of individuals.

Q At this time were you or any members of your group armed with shotguns?

A I was not armed with a shotgun.

Q Were any members of your group?

A Not to my knowledge, not at the conference room.

Q When did the arming of the shotguns take place?

A I have no idea.

Q Did any member of your group -- withdrawn.

At any time during that day or the following day did you see any members of your group or any members of the BNDD armed with shotguns?

A No, I didn't.

Q You did not. Is that your answer?

A That's my answer.

Q When you left the conference room, what time was this?

A Approximately 11:00 p.m.

Q And where did you go from the conference room?

A Well, I conferred with Detective Gillespie and Detective DeMarco concerning Mr. Capra.

Q Where did this take place?

A Just outside the conference room.

Q When you say "conference room," wouldn't it be more adequate to describe it as an auditorium?

A No.

Q How many people were in the conference room?

A Several hundred.

Q Several hundred. Never mind.

And it was not an auditorium?

A No, it's not an auditorium.

Q Would you describe the conference room?

MR. PEPPER: Your Honor, objection. What is the relevancy of all this?

THE COURT: What is the relevance?

MR. SLOTNICK: It goes to the witness' credibility. We have had other witnesses' statement with regard to what happened prior to executing the warrant on Mr. Capra and I would like to explore it, your Honor.

THE COURT: Objection sustained.

Q What time did you leave the conference room?

A 11:00 p.m.

Q And who did you leave with?

A With Detective Gillespie, Detective DeMarco, Special Agent Sokel, myself -- myself, several members of the press.

Q How many members of the press?

A I left with two. I believe there may have been there.

Q How did you travel?

A Government vehicle.

Q How many people were in your Government vehicle?

A I believe there was four.

Q Would you identify them?

A There was Special Agent Sokel, myself and two members of the press.

Q Were in your vehicle.

And how many people were in the vehicle of Detective Gillespie?

A I believe there was either three or four.

Q Three or four.

And you received a copy of an arrest warrant, is that correct?

A I had not personally received it but there was one issued.

Q Do you know whether Agent Sokel had a copy of

an arrest warrant?

A He may have.

Q You know it's perfectly proper to arrest a man without an arrest warrant when you know one exists?

A Yes.

Q Did you give Detective DeMarco or Detective Gillespie an arrest warrant?

A I did not.

Q Do you know if anybody did?

A I have no idea.

Q When was the first time you saw the arrest warrant?

A I never saw the arrest warrant.

Q Who notified you that the defendant Capra had to be placed under arrest?

A We were notified that evening.

Q By whom?

A By, I believe it was Mr. Pohl.

Q I'm sorry?

A Mr. Pohl.

Q Did he indicate that the defendant Capra had been indicted for a federal offense?

A Yes, he did.

Q And that an arrest warrant had issued?

1
2 A Yes.

3 Q And, therefore, you went out looking for the
4 defendant Capra?

5 A Yes.

6 Q Did you ever see the defendant Capra prior to
7 the evening or the morning of April 14, 1973?

8 A No, I had not.

9 Q Did Detective DeMarco or Agent Sokel or Sergeant
10 Gillespie indicate to you whether they had ever seen the
11 defendant Capra?

12 A I don't believe Agent Sokel had ever seen him
13 but I was under the impression that Detective Gillespie
14 and Detective DeMarco knew Mr. Capra.

15 Q By the way, your vehicles were equipped with radio
16 equipment; is that correct?

17 A Yes.

18 Q So you could speak to each other?

19 A Yes.

20 Q You left BNDD headquarters with Agent Sokel and
21 the two press men approximately what time?

22 A Approximately 11:30.

23 Q That evening?

24 A Yes.

25 Q And Detective DeMarco and Sergeant Gillespie

and two others left approximately the same time; is that correct?

A We all left the same time.

Q All left at the same time.

You decided that you were going to an area, is that correct?

A That is correct.

Q Where was the area that you decided to go to?

A We decided to go to an area over on, I believe it's either Second or Third Avenue.

Q In Manhattan?

A In Manhattan.

Q And you were looking for the defendant Capra?

A Right, sir.

Q Had you seen a photograph of the defendant Capra prior to your going to look for him?

A I don't remember.

Q Well, what about Agent Sokel, do you know whether he had seen a photograph of the defendant Capra?

A I can't answer for Agent Sokel.

Q So, actually, if you saw the defendant Capra in front of you, you wouldn't even know who he was?

A This is why we were with Detective DeMarco and Gillespie; right, sir.

1
2 Q I see.

3 Actually, they were looking for Capra and you
4 were to execute the arrest; is that correct?

5 A That is correct. We were to assist in executing
6 the arrest.

7 Q But it was a federal arrest?

8 A Yes, it was.

9 Q Did you get credit for arresting the defendant
10 Capra?

11 A Did I get credit?

12 MR. FEFFER: Objection as to who got credit
13 for what arrest.

14 THE COURT: What does that mean, Mr. Slotnick?
15 Are they on commission?

16 MR. SLOTNICK: I hope not, your Honor.

17 THE COURT: What are you talking about?

18 MR. SLOTNICK: It's been brought into the case
19 that a man gets a credit for making an arrest.

20 THE COURT: Who brought it into the case?

21 MR. SLOTNICK: Some testimony on it.

22 THE COURT: By whom?

23 MR. SLOTNICK: On a prior hearing, your Honor.

24 THE COURT: Sustained.

25 Let's go on.

MR. SLOTNICK: On the Dellacava hearing.

THE COURT: Let's go on.

Q Are you listed as the arresting officer on defendant Capra's arrest sheet?

MR. FEFFER: Objection, your Honor.

THE COURT: What's the relevance?

MR. SLOTNICK: Method of operation.

THE COURT: Sustained.

Look, I wish you would move on, Mr. Slotnick. I'm the trier of fact. This questioning has been singularly unenlightening, especially for you, and I wish you would approach the point.

Q Did there come a time when you appeared at the defendant Capra's home?

A Yes.

Q About what time was that?

A We were in the vicinity close to 1:00 a.m. in the morning.

Q When you say "in the vicinity," do you mean you were parked someplace?

A That is correct.

Q Where were you parked?

A I was parked at several different spots. Where I could see the area of the house or the entrance of the

road that goes into the cloverleaf where Mr. Capra lives.

Q And where were Detectives DeMarco and Gillespie?

A They were in the vicinity also for awhile.

Q And did they then leave?

A At one point they did leave.

Q And did you observe an individual entering the Capra household at any time during your surveillance?

A Yes, I did.

Q What was the name of the individual, if you observed anyone entering the Capra household?

A I have no idea. It was later identified as his lawyer.

Q When you say "later identified," an hour afterwards? Two hours afterwards?

A I don't remember when it was identified, but it was not him; it was not Mr. Capra.

Q It was his attorney and you were told sometime that morning; is that correct?

A That is correct.

Q You were told that before you left Northwood Circle?

A Correct. He was in the house when Mr. Capra came out.

Q I see.

Now, did you observe Detective Gillespie enter the house?

A No, I didn't.

Q Or Detective DeMarco?

A No, I didn't.

Q Did you know they were in the Capra house, though?

A Yes.

Q How did that come about?

A I went into the Capra house.

Q And you found Detective Gillespie and DeMarco in the Capra house?

A Yes.

Q Who else did you find in the house when you walked into the house?

A His wife, Mrs. Capra, was there.

Q Who else?

A I believe there was a child.

Q His lawyer?

A I didn't go into the house when the lawyer was there. This was prior to the lawyer coming to the house.

Q I see.

The two press men, were they there?

A The two press men that were with me were in my car.

Q Well, the other two press men, the ones with Gillespie and DeMarco, were they there?

MR. FEFFER: Objection as to the relevancy of this entire line of cross-examination.

THE COURT: Mr. Slotnick, apart from relevance, it's undisputed they were there..

MR. SLOTNICK: On that basis I'll leave the area, your Honor.

THE COURT: I don't think it's disputed, is it, Mr. Feffer?

MR. FEFFER: No, your Honor.

THE COURT: I don't really know what you are taking up all this time on cross-examination for but it really is not part of your commission from your client not to bore me. Try to get to the issues I'm to decide.

MR. SLOTNICK: I take exception.

Q What time did you enter the Capra household, the first time?

A Approximately 5:30 a.m.

Q In the morning?

A Yes.

Q You stayed there for how long?

A I only stayed in there for several minutes.

Q Then you left?

1
2 A Then I left.

3 Q And then what was the next thing that you
4 observed in front of the Capra household?

5 A I observed the attorney pulling into the driveway.

6 Q Did you then approach the man who was pulling
7 into the driveway?

8 A No, I didn't approach him. I drove by him,
9 watched him go into the house.

10 Q Did anybody approach him in an automobile and
11 ask him "Who are you?" or "What are you doing here?" or
12 anything of that sort? If you recollect.

13 A Not that I remember.

14 Q Not that you remember.

15 There were two automobiles present; is that
16 correct?

17 A That is correct.

18 Q In totality, outside of the Capra household,
19 there were two automobiles that staked out the Capra house
20 on Northwood Circle in New Rochell, yours and the
21 New York City police; is that correct?

22 A I believe we had assistance from several other
23 vehicles. I'm not sure on that. I don't remember.

24 Q You had assistance from several other vehicles
25 who would have been BNDD agents; is that correct?

1
2 A They would have been agents plus detectives
3 from the New York City Police Department. But they did
4 nto go into the house when they heard that the arrest or
5 that Mr. Capra was in the house. I believe they left.
6

7 Q But they were in the area.

8 Now, at the time that Sergeant Gillespie was
9 in the Capra house with Detective Capra, were you able
10 to observe the Capra house from your vantage point or
11 were you elsewhere?

12 A We were in the area where we could observe
13 the entrance, the road leading into the house, and the
14 garage and areas toward the front door. We did not have
15 the front door under surveillance.

16 Q I see.

17 And when the attorney walked in, did you lose
18 sight of him prior to his walking into the house?

19 A I don't understand the question.

20 Q Did you see him walk into the house?

21 A I saw him approach the house, approach the front
22 door. I didn't see him go into the house.

23 Q You didn't -- at this time you did not go towards
24 the Capra house; is that correct?

25 A No, I didn't.

Q And at this time your assistants were still in

1 the area; is that correct?

2 A There was another car in the area, yes.

3 Q When was the next time you saw Mr. Capra or
4 when was the first time you saw Mr. Capra?

5 A Approximately 6:25.

6 Q Tell us the circumstances surrounding that.

7 A He was coming out of the house with Detective
8 Gillespie and Detective DeMarco.

9 Q That's DeMarco, is that correct?

10 A Yes.

11 Q And the other press men, if you recollect?

12 A There were two in my vehicle.

13 Q They were still in your vehicle?

14 A No, they had gotten out.

15 Q And there were the other men that walked into
16 the house with Detective DeMarco, were they coming out of
17 the house, too?

18 A I believe they were. I'm not sure.

19 Q I show you Defendants' Exhibit E in evidence and
20 ask if this is a fair representation of what you have just
21 been testifying about.

22 A That is correct.

23 Q Would you point out --

24 MR. SLOTNICK: Your Honor, may I have him mark
25

the exhibit or not?

THE COURT: Any objection?

MR. FEFFER: No objection.

THE COURT: I think we will plan to do all that
after lunch.

MR. SLOTNICK: Thank you, your Honor.

THE COURT: 2:15, gentlemen.

(Luncheon recess.)

AFTERNOON SESSION

2:15 p.m.

(In open court.)

THE COURT: Before I forget, for your information and guidance, we have to start at 10:30 tomorrow morning. You are not forbidden to get here before then but we won't be ready before then.

MR. SLOTNICK: Your Honor, as I was getting up, the defendant Morris indicated he had an application.

MR. STONE: Your Honor, the defendant Morris has asked me if he could address the Court. I certainly take no position on that. However, I think it would be to his advantage if I consulted with him first.

THE COURT: It seems to me you ought to talk to your lawyer first, Mr. Morris, and see if anything he tells you might make it desirable that you not talk to me. After he has talked to you, if you want to address the Court. the way we say, I will hear you. Okay?

DEFENDANT MORRIS: Your Honor, I presented this to him several times and I don't think it's necessary to consult with him about it.

THE COURT: You mean you and he don't agree on this, either?

DEFENDANT MORRIS: That is correct.

THE COURT: Well, talk to him anyhow. After this witness is through I'll hear you.

Try to whisper to each other, see where you stand, and I'll hear you then.

ROBERT ALLEN, resumed.

CONTINUED CROSS-EXAMINATION

BY MR. SLOTNICK:

Q Special Agent Allen, before the lunch break and before you left the courtroom you were in consultation with Mr. Feffer for about ten minutes; is that correct?

A Approximately five, ten minutes.

Q Were you discussing your testimony?

A No, we weren't discussing my testimony. We were discussing something else.

Q You weren't discussing any facts surrounding this case and the arrest on the morning of April 14th?

A Yes, we were.

Q You were?

A Yes.

Q Okay.

Did you discuss it with anybody else during the lunch hour?

A No, I didn't.

Q Did you leave with Mr. Feffer and continue that

discussion?

A No, I didn't.

Q Now, I show you Defendants' Exhibit E and ask, as you have stated and the record, I believe, will indicate, that is a fair representation from what you saw in your automobile as the defendant Capra was being marched out of his house?

A No, that is correct. I am in this picture.

THE COURT: Mr. Allen, I am having trouble hearing you. Speak louder.

A I am in this picture.

Q Would you, and I think we have the approval of the Court and the consent of the Government, would you just put a circle around each head and indicate by initial who they are, and as you are doing it say it for the record.

A This is Mr. Capra.

Q Write a "C" -- No. 1 is Mr. Capra, all right.

A That's Detective Gillespie.

Q That's No. 2.

A Special Agent Sokel.

Q That's No. 3.

A Detective DeMarco.

Q No. 4.

1
2 A Myself, No. 5.

3 Q And No. 5 is Special Agent Allen?

4 A Yes.

5 Q At the time this was occurring, do you know if
6 anybody else came from the house?

7 A At this time?

8 Q Yes.

9 A Not that I know of.

10 Q By the way, there were other special agents in
11 the area, is that correct, other than yourself and
12 Sokel?

13 A At the time of the arrest?

14 Q At the time you were walking out of the door.

15 A No, there were not.

16 Q Now, I show you Defendants' Exhibit F and ask
17 you to only look at the portion that is surrounded, or within
18 the red circle, and would you tell me who you identify
19 from that photograph?

20 A Identify Mr. Capra, Detective Gillespie, Detective
21 DeMarco, and I was in the foreground.

22 Q You were in the foreground?

23 A Yes. I was right behind them.

24 Q As you see the exhibit -- it's in evidence and
25 you see the caption, it says, "John Capra assisted to the

car," and is that a fair representation of what you saw happening?

A Yes.

Q Mr. Capra was being placed into an automobile?

A Yes.

Q Do you know where Mr. Santangelo was at this time?

A Who is Mr. Santangelo?

Q The lawyer.

A No, I don't.

Q You don't know whether he remained in the house or walked outside with you?

A I don't know.

Q Now, you indicated -- withdrawn.

On Defendants' Exhibit E you do not see Mr. Santangelo?

A That is correct.

Q Now, you indicated to us that there came a time when Detective DeMarco asked you for your card to read the rights to the defendant; is that right?

A I don't believe I testified to that. I said I handed the card to, I believe, Detective DeMarco. He said he was going to read the rights to Mr. Capra. I handed the card. I said, "Here is the Bureau of Narcotics

card, the rights are written down, the Form 13-A. Read it off of this."

I know for a fact that Detective Gillespie read him those rights, reading from the card.

Q Did you see or hear Detective Gillespie do this?

A Do what, sir?

Q Read the rights off the card.

A Yes, I did.

Q Where was Detective Gillespie when he was reading the rights?

A He was inside the car.

Q Where was the defendant Capra?

A Seated next to him.

Q Was there anybody else in that automobile?

A Detective DeMarco was in the front seat.

Q Anybody else that you remember?

A Not that I remember.

Q Where were you?

A I was standing outside the car, leaning into the car, listening to the conversation.

Q And you heard every word he said, is that correct?

A I heard him read the rights off the card, BND 13-A.

Q And was your partner, Special Agent Sokel, there,

1
2 too?

3 A No, he was not. He was back in my vehicle.

4 Q And where was your vehicle?

5 A Right behind the vehicle that the defendant was
6 in.

7 Q Now, wasn't there another man whose head was in
8 that car window listening to those rights being read, if
9 you remember?

10 A I don't remember.

11 Q After you heard the rights being read, what did
12 you do?

13 A I advised Detective DeMarco to shut his radio
14 off, that I would notify Bureau of Narcotics headquarters
15 that we had the defendant in the vehicle and was proceeding
16 to headquarters, 555 West 57th Street.

17 Q Actually, you did not have control of the
18 defendant, is that correct?

19 A We were right behind him.

20 Q But he went in the car with the New York City
21 Police Department?

22 A That's correct.

23 Q You then departed?

24 A That is correct.

25 Q Prior to your departing the scene, did you see

1
2 the lawyer again?

3 A I don't remember.

4 Q Now, where did Detective Gillespie proceed to?

5 A Drove to 555 West 57th Street.

6 Q And you followed him?

7 A Yes, sir.

8 Q There was no radio contact between the two of
9 you; is that correct?

10 A Not after I told him to shut his radio off
11 and that I would keep communication with headquarters.

12 Q Who was in your automobile as you drove in
13 back of Detective Gillespie?

14 A Detective -- Special Agent Sokel, two gentlemen
15 from the press, and the police official.

16 Q There were five men in your vehicle?

17 A I believe that is correct.

18 Q Were you driving an official Government vehicle?

19 A Yes, I was.

20 Q And you were instructed to chauffeur around
21 the gentlemen from the press?

22 A I wouldn't believe "chauffeur around" is the
23 term to use.

24 Q I'm sorry. I withdraw that.

25 Were you instructed to have the gentlemen from

the press accompany you during this evening?

A I was told they would be assigned to our four-man team.

Q Do you know their names?

A I have no idea.

Q Do you know what media they came from?

A One came from, I believe, was the New York Magazine. The other one was from the Daily News.

Q Did they carry cameras?

A I believe the man from the Daily News -- I know the man from the Daily News had a camera.

Q He spent the entire morning and evening -- I'm sorry, evening and morning in the automobile with you?

MR. SLOTNICK: I'm leaving the area, your Honor.

MR. FEFFER: Objection, your Honor.

THE COURT: He is leaving the area.

Q Is that correct?

A Most of the morning and the evening.

Q Now, you followed the defendant Capra to West 57th Street. Did you see him leave the vehicle at West 57th Street?

A Yes.

Q And who did he leave with?

A He left with the four of us.

Q Who were the four of you?

A Detective DeMarco, Detective Gillespie, Special Agent Sokel and myself.

Q What happened to the press men?

A The press men were not allowed upstairs at this time.

Q They were allowed at a later time, is that correct?

A I have no knowledge of that.

Q I see.

Now, isn't it true that Detective DeMarco actually did not accompany the defendant Capra with you, that he went to park his automobile?

A I don't remember. I know he was upstairs when we were processing --

Q We are talking about your recollection as you alighted from the automobile. Who went with the defendant Capra to the building at West 57th Street?

A To the best of my knowledge, all four of us.

Q All four of you.

And what happened at the entrance of the building at West 57th Street?

A There were several guards downstairs from the Bureau of Narcotics, special agents. We got into the

elevator, went up to the 18th floor.

Q Now, these guards, how many were there, if you can recollect?

A I can't recollect.

Q They were armed, am I correct?

A That is correct.

Q They had rifles and shotguns?

A I don't believe I saw any shotguns.

Q Rifles?

A I don't believe I saw any rifles.

Q Were there any other people entering the building at the time you entered the building? And we are talking now about West 57th Street.

A At the exact time?

Q Yes.

A There were several other defendants.

Q BEing brought into the building at the exact time?

A That were in front of us and several came in behind us.

Q Now, from the period of time that defendant Capra left the automobile of Detective Gillespie, did you have occasion to question him or ask him any questions?

A I didn't ask any questions.

Q Did you hear anybody ask him any questions?

A From the four of us, sir?

Q That is correct.

A I heard Detective Gillespie ask Mr. Capra if he understood his rights.

Q When was this?

A This was in the car.

Q No, I'm talking about after you exited at 57th Street.

A No, I didn't.

Q Now, when you exited your vehicle with the defendant Capra, you say other defendants were being brought in at the same time.

A Approximately the same time. They were upstairs.

Q Just stay on the street if you can.

A No, I don't remember anybody else being with us at the same time going into the elevator.

Q And prior to the entrance into the elevator you and Sokel and the other two detectives were the only law enforcement agents that you saw prior to your seeing the men in front of the elevator; is that correct?

A That is correct.

Q What happened at the elevator? In other words, what did you do when you reached the guards at the elevator?

1
2 A I believe we informed them who we had and we
3 were bringing him upstairs to the 18th floor.

4 Q Did you show them any identification whatsoever?

5 A They knew who I was.

6 Q And then you took the defendant Capra up to the
7 18th floor; is that correct?

8 A That is correct. Also we had armbands on for
9 identification.

10 Q The armbands that you had on, did they say
11 anything?

12 A Just said "U.S."

13 Q In other words, you were able to tell the
14 defendants from the agents?

15 A This was in the processing area, yes.

16 Q Now, during the period of time from the elevator
17 up to the ride to the 18th floor, did anybody in your
18 company question the defendant Capra?

19 A Not that I can remember.

20 Q Well, if you can recollect, was there total
21 silence in the elevator? Were you talking to anybody?
22 Was Sokel talking to anybody?

23 A I believe there were words said, as to what went on,
24 I can't remember.

25 Q You might have been conversing but in your own

mind you were careful not to ask Capra any questions?

A I didn't ask him any questions.

Q You were careful not to ask him any questions, is that correct?

A I was careful.

Q Because he had a lawyer, is that correct?

A I knew there was a lawyer back at his residence.

Q As a result thereof, you didn't ask Capra any questions?

A I didn't ask him any questions; that's true.

Q Now, when you exited at the 18th floor, did you observe other agents, other defendants?

A That is true.

Q And tell us what you observed.

A We had a station set up for the individual to be processed. We signed him in on a book as to who accompanied Mr. Capra up to the 18th Floor. I believe four of us signed the book. I'm not sure of that.

Then he was turned over for processing and we gave him a strip search and turned him over to the processing agents.

Q Do you remember to whom you turned over the body of defendant Capra?

A No, I do not.

Q Did there come a time during the course of the afternoon that you saw Capra again?

A Outside the processing room?

Q Outside the processing room.

A No, I didn't.

Q So, up until this point, you still had not asked the defendant Capra any questions; is that correct?

A That is correct, I didn't.

Q Nor had anybody in your company other than Gillespie asking whether he understood his rights, asked him any questions; is that correct? If you recollect.

A To the best of my knowledge, I didn't ask him any questions. Whether anybody else asked him questions, I didn't overhear it.

Q Now, did you observe the 18th floor and did you observe any agents parading around with either rifles or shotguns?

A On the 18th floor?

Q Or any time during the course of that day, did you see an agent armed with a rifle or shotgun?

A Not that I can remember.

Q I show you Defendants' Exhibit H for identification and ask you whether this refreshes your recollection as to whether agents carried shotguns on that day.

MR. FEPPER: Your Honor, can we have the day?

A That is not the right day.

Q What day do you recognize this as being?

A The following day. I believe it's the 15th of April.

Q On that day you saw agents with shotguns?

A It shows it in the pictures.

Q What did you see?

A I saw agents with shotguns on the 15th.

Q And you remember that?

A Rifles. Whether they were shotguns or not, I was at a distance.

Q But you remember that as a result of seeing this, is that correct? That refreshes your recollection?

A No.

Q You remember that independently?

A I remember that independently.

Q But you don't remember that on the 14th?

A Correct.

Q Now, did there come a time during the course of the day of the 14th that you saw any United States Attorneys up at the BNDD headquarters?

A I know there was a United States Attorney present on the 13th.

Q On the 13th. Is that the evening of the 13th or the day of the 13th?

A I believe it was the evening of the 13th.

Q Do you remember which one it was?

A No, I don't.

Q And do you remember whether there were any UNITED STATES Attorneys there on the morning of the 14th, if you remember?

A Not that I know of.

Q Or at any time during the 14th?

A I wasn't involved in the processing, so I didn't know who was there at the processing.

Q After you turned the defendant Capra over for processing, what did you do?

A I left.

Q And did you see the defendant Capra at all during the next several hours?

A No, I didn't.

Q What time did you arrive at 57th Street, if you recollect?

A Must have been around 7:30, 8:00 o'clock. I'm not sure.

Q 7:30, 8:00 o'clock.

What time did you turn the defendant Capra to the

processing agents?

A Approximately a half-hour later after we arrived.

Q About 8:30, 9:00 o'clock?

A Whatever time we arrived, it was about a half-hour later.

Q Now, did you fill out any forms prior to your turning over the defendant Capra or subsequent thereto?

A Yes, we filled out forms.

Q Do you have them with you?

A Do I have the forms? No.

MR. SLOTNICK: Does the Government have them?

MR. FEFFER: I'm not sure what forms he is referring to, your Honor.

MR. SLOTNICK: As far as I understand it, there is some sort of an arraignment sheet that they hand in prior to processing, which the prints go on and I think the photograph is attached to. I have seen it somewhere in this courthouse. I think it's a yellow sheet.

Q Does that mean anything to you?

A I believe the form I filled out was with reference to what the individual had in his possession.

Q Is there a form which indicates that an attorney was present, a form that you fill out?

A I wasn't in charge of processing.

Q Did you say anything to the processing agent as you handed over the defendant Capra?

A No, I didn't.

Q Not a word?

A Other than maybe saying who the individual was.

MR. SLOTNICK: Thank you.

MR. FEFFER: No questions, your Honor.

THE COURT: Thank you.

(Witness excused.)

MR. FEFFER: The Government calls Michael Waniewsky.

THE COURT: Mr. Stone, you want to talk some more or are you finished?

MR. STONE: No, your Honor. I think I have Mr. Morris' position fairly clear. Mr. Morris feels that since he was convicted in Ohio for possession with intent to sell and that the possession of the particular narcotics is the same narcotic drugs which is intended for production in this case; that by mere conviction of that judicial fact of possession, which was established by an Ohio court, Mr. Morris has standing here to join in the suppression motion to suppress the seizure of those drugs in Ohio.

Accordingly, he has asked me at this stage to join the suppression motion made by three other defendants in this case and urge upon the Court that because of his

1 rdach

467

2 conviction, that alone gives him standing to move for
3 suppression; that the evidence of this case, according
4 to at least one witness --

5 THE COURT: Let me slow you down. In fact, let
6 me stop you.

7 Whether or not you think well or ill of that
8 motion, and quite apart from its tardiness, I think you
9 had better reduce it to writing and let Mr. Morris
10 indicate by his initials or his signature that it correctly
11 states whatever he thinks his position is, as well as
12 whatever you think it is as you can formulate it as a
13 lawyer, and I will look at it.

14 MR. STONE: All right, your Honor.

15 Is that all right, Mr. Morris? Is there anything
16 I left out?

17 THE COURT: I don't care what you left out. I
18 want you to write it down. I'm not going to interrupt
19 for this kind of oral presentation at this stage of the
20 proceeding.

21 Proceed.

22 M I C H A E L A. W A N I E W S K I,
23 called as a witness by the Government, being
24 first duly sworn, testified as follows:

25 DIRECT EXAMINATION

BY MR. FEFFER:

Q Mr. Waniewski, by whom are you employed?

A United States Department of Justice, Drug Enforcement Administration.

Q I am going to direct your attention to April 14, 1973. Can you tell the Court what your assignment was on that date?

A At that time I was assigned to supervise the lodging and processing of prisoners who were being rounded up on that date.

Q Approximately how many prisoners did you receive and process, approximately?

A Oh, fifty or so.

Q Do you know a John Capra?

A Yes, I do.

Q Do you see John Capra in this courtroom today?

A Yes.

Q Point him out, please.

A Mr. Capra is sitting in the back against the wall. He has a blue suit, blue vest, and a blue tie.

MR. FEFFER: Let the record show the witness correctly identified John Capra, the defendant.

Q Did there come a time on April 14th when Mr. Capra was brought in to you for processing?

1
2 A Yes.

3 Q What time was this, approximately?

4 A Before 9:00 o'clock. I'd say it was after 7:00,
5 sometime after 7:00. I'm not sure, exactly.

6 Q What did you do with John Capra when you received
7 him?

8 A Mr. Capra came up the freight elevator to the
9 18th floor. He was logged in as being received and then
10 he was taken to a cell. And when an opportunity came about
11 when processing was available, he was selected and processed.

12 Q Now, can you describe the cells or detention
13 facilities at the Bureau of Narcotics at that time?

14 A They are on the 18th floor, the north side of
15 the building, and there are three cells in which they
16 were lodged.

17 Q Was Mr. Capra placed in one of these three cells?

18 A Yes, he was.

19 -Q Do you know Mr. Dellacava, Stephen Dellacava?

20 A Yes, I do.

21 Q Do you know Leoluca Guarino?

22 A Yes, I do.

23 Q Do you see these men in court today?

24 A Yes, I do.

25 Q Point first to Mr. Dellacava, please.

1
2 A Mr. Dellacava is in the gray suit against the
3 wall in back, with the glasses on.

4 Q And Mr. Guarino?

5 A Mr. Guarino is with the check sport coat, white
6 hair, sitting next to Mr. Santangelo.

7 MR. FEFFER: May the record reflect that both
8 defendants have been identified.

9 MR. SLOTNICK: May the record reflect that's
10 George Santangelo, not the witness Michael Santangelo.

11 Q Now, were these two men, Dellacava and Guarino,
12 also in the cell block area at this time?

13 A I believe they were.

14 Q Were they in the same cell with Mr. Capra?

15 A At one time they may have met.

16 To understand the situation, when prisoners were
17 brought in, they were kept in one cell. When they were
18 processed, they were transferred to another cell to account
19 for their presence.

20 Q Did there come a time when John Capra was in one
21 of these cells and he engaged you in conversation?

22 A Yes.

23 Q Now, tell the Court what Capra told you.

24 A Mr. Capra was in one cell and he leaned over
25 to the bar as I was walking by and he said, "What are you

guys going to do if you take us all off the street?

You guys will be out of a job."

Q Did you respond to that statement?

A I did a few seconds later. Not at first.

Q What did you tell him?

A I believe I told him I'd probably go back to farming, something like that.

Q Did you ask Mr. Capra any questions or talk to him in any manner prior to the statement which he made to you?

A No. Just to tell him what cell to go into, and so on.

Q At the time this statement was made, were Dellacava and Guarino in the same cell?

A No, I don't believe so.

Q Now, you have indicated that you did not say anything to Mr. Capra to elicit the statement he made --

MR. SLOTNIC: I object to the form of the question. This is direct and this is leading.

THE COURT: Well, I'm not sure it's leading but don't sum up, just ask the question.

Q Did any other agent or any other individual question Mr. Capra prior to the time that he made the statement in your presence?

A I don't know. I don't know.

MR. FEPPER: No further questions.

CROSS-EXAMINATION

BY MR. SLOTNICK:

Q Agent Waniewski, what makes you so familiar with the defendant Capra?

A What makes me so familiar with him?

Q How do you know him so readily?

A Well, when he was brought in and he was received on the 18th floor, whoever brought him in said, "This is John Capra, you know, Hooks," and he was given over to me and I told him to be lodged and remembered his face.

Q You don't remember who said that to you, do you?

A Said what?

Q "Here's John Capra, you know, Hooks."

A No, it was one of the arresting officers but I can't be sure who it was.

Q Did you know Hooks?

A No, not prior to that time.

Q Did you tell the arresting officer you weren't familiar with the defendant nor his alleged alias?

A No.

Q What was your procedure with regard to processing defendants on that date?

1
2 A I didn't process the defendants. All I did
3 was supervise their lodging. When there was an opening
4 for processing, it was told to me and then I would
5 select someone who had not been processed to be processed
6 and they would go into another room, and what happened
7 I didn't see.

8 Q Do you know what time defendant Capra was processed
9 that day?

10 A No, I don't.

11 Q Are there records relating to that?

12 A I don't know if there would be records. There
13 would be a record of him being brought in, but a record
14 of being processed I don't think there were any records.

15 Q Do you know what time he left BNDD headquarters
16 that day?

17 A It was sometime in late afternoon. I believe
18 it was before --

19 Q About 3:30?

20 A Around 3:30; 3:30, 4:00 o'clock.

21 Q At the time he left he had already been fully
22 processed?

23 A Yes, I believe so.

24 Q By the way, were you working in conjunction
25 with anybody or were you just in charge, yourself, in charge

1
2 of placing individuals in spots where they could be
3 taken out of their cells and processed and placed back
4 and doing a lot of paper work?

5 A No. There were various people that were assigned
6 to the floor. As they were walking around or whatever,
7 I would designate them to open a certain cell or take
8 someone out, have him processed or have him change a cell
9 or whatever. There were about ten or twelve people in the
10 area.

11 Q All special agents?

12 A No, some were City police officers also.

13 Q Were there any U.S. Attorneys that you had
14 noticed on the floor at that time?

15 A No.

16 Q Now, when the defendant Capra was turned over
17 to you, you took him to a cell on the 18th floor, is that
18 correct?

19 A Well, he arrived on the 18th floor and then I
20 just assigned him to a cell and someone took him and
21 placed him in the cell.

22 Q Did you say anything to him, like "John," or
23 "Mr. Capra," "You go to Cell 13," or something of that sort?

24 A No, I don't think I addressed him that way. I
25 just said I told someone to take him and put him in a cell.

1
2 Q At the time he was turned over to you he was in
3 handcuffs. Am I correct?

4 A Yes, I believe so. Then the handcuffs were
5 taken off.

6 Q Prior to his being placed in a cell?

7 A Yes.

8 Q Were you familiar at all with the details of
9 the indictments that were to be unsealed, as it came
10 out two days later?

11 A No.

12 Q Now, how many defendants were present at about
13 the time that Mr. Capra was brought to the 57th Street de-
14 tention center on the 18th floor?

15 A There were over thirty people there already.

16 Q Would you describe the facilities in terms of
17 space, as best you can?

18 A The floor with the cells in them are approximately
19 from where that thermostat is to that wall over there,
20 and there are three cells, three cells in about that area.

21 MR. SLOTNICK: May we stipulate about twenty-four
22 feet wide?

23 MR. FELD: Why don't you ask the question of the
24 witness?
25

2 Q Can you estimate about how wide the cells are at
3 57th Street?

4 A Nine to eleven feet, twelve feet.

5 Q By what? Are they rectangular or square?

6 A Rectangular. So they would be 12 by 16, something
7 like that.

8 Q At that time there were approximately how many men
9 in each cell?

10 A Well, it varied.

11 Q Well, at the time you allege you heard a statement
12 from the defendant Capra, how many men were there in the cell
13 that he was in?

14 A In the cell he was in I'd say approximately five
15 to eight people.

16 Q Do you remember the other people that were in that
17 cell?

18 A No. I believe, though, there were about two
19 defendants from New Jersey and two black defendants and
20 Mr. Capra and someone else.

21 Q And you stated that at one time Mr. Capra and Mr.
22 Guarino and Mr. Dellacava were housed together in a cell all
23 by themselves. Is that correct?

24 A Yes.

25 Q And where were the other 47 men?

1 A In --

2 Q In the other two cells?

3 A No. Well, they kept moving the prisoners around
4 on a rotating basis so that it was rare that one prisoner
5 stayed in one cell throughout the whole --

6 Q Was there a standard or disproportionate number of
7 individuals in the one cell as against the various two?

8 A It happened at times.

9 Q Do you know any reason that the defendants Capra,
10 Dellacava, and Guarino were placed in one cell alone?

11 A I don't know that they were placed in one cell
12 alone.

13 Q Isn't it true I just asked that question and you
14 said they were? Perhaps I was mistaken.

15 A I thought you said were they in separate cells.

16 Q No, in one cell alone, the three of them.

17 A I don't remember, no.

18 Q It is possible it might have happened?

19 A Yes.

20 Q Now when the defendant Capra made the statement,
21 what was that statement again?

22 A He said, "Ming, what are you guys going to do if you
23 take us all off the street? You guys are going to be out of
24 a job."
25

1 dsk3

Waniewski - direct

478

2 Q You said "Well, I'm going to a farm", or something
3 like that?

4 A I had no reply immediately.

5 Q You thought about it?

6 A Yes.

7 Q Did you write the statement down?

8 A No, I didn't.

9 Q And when did you first --

10 A Not at that time.

11 Q When did you first reduce the statement to writing?

12 A The following Monday, the following Monday.

13 Q And did you reduce it to writing on a B.N.D.D.
14 form?

15 A Yes, it was a B.N.D. 7.

16 MR. SLOTNICK: May I have a moment, your Honor?

17 THE COURT: Yes.

18 MR. PEPPER: May we have it marked for identif-
19 ication?

20 MR. SLOTNICK: Absolutely.

21 (Defendant's Exhibit I. marked for identification.)

22 Q Perhaps you can tell me, what does R.O.I. mean
23 in capital letters?

24 A Report of investigation.

25 Q The report indicates that in the course of your

1 duties you had an opportunity to converse with numerous
2 defendants; that's correct, isn't it?
3

4 A Yes.

5 Q By the way, at the time you spoke to defendant
6 Capra, were you aware that he had retained an attorney?

7 A No.

8 Q Are you aware of it now?

9 A Yes.

10 Q The report indicates that Mr. Capra weighs 200
11 pounds. Did he weigh 200 pounds, as you recollect?

12 A To the best of my recollection he was heavier than
13 he is now.

14 Q As a matter of fact, I show you Defendant's Exhibit
15 E. and ask whether you recognize the individuals in that
16 photograph by number?

17 A By number. Government 1 is Mr. Capra, 3 is
18 special agent Sokel; Number 2 appears to be Sgt. Gillespie,
19 and Number 4 appears to be Detective De Marco, and special
20 agent Allen Number 5.

21 Q 100 per cent. You knew all of the arresting
22 officers in Mr. Capra's case?

23 A I know them now. I didn't at that time.

24 Q You didn't know them then?

25 A No, not at that time.

1 Q Now, you allege that the defendant Capra made this
2 statement to you at approximately 9 a.m. on April 14?
3

4 A Approximately.

5 Q That would be 9 o'clock Saturday morning?

6 A 9 o'clock Saturday morning.

7 Q When did you start working prior to 9 o'clock
8 Saturday morning?

9 A Officially I went on duty at midnight.

10 Q So at the time the statement was made you had been
11 working at your employment for approximately nine hours.
12 Is that correct?

13 A That's correct.

14 Q And then some 72 hours later you remember the
15 statement and wrote it down. Is that correct?

16 A No. When the statement was made to me, then I
17 reported it and I was told to reduce it to a report.

18 Q Did you reduce it to writing prior to this report
19 of April 17, 1973?

20 A No.

21 Q And when was the first time that you told the
22 United States Attorney about this report?

23 A I believe it was that day. It was Saturday.

24 Q Which United States Attorney did you tell?

25 A I really don't know because there were three or

four that were present and I really don't know. But I told one of them.

Q Who was present?

A Well --

Q Mr. Feffer, Mr. Feld, Mr. Velie?

A Yes.

Q Mr. Phillips?

A I don't know if Mr. Phillips was there. Mr. Harris.

Q Anybody else?

A I don't remember.

MR. FEFFER: Can we have a time as to when they appeared, instead of categorizing that date?

THE COURT: Well, you may bring it out, if you like.

MR. FEFFER: Fine, your Honor.

Q Do you remember the name of the other U.S. Attorney who was there?

A No. I think that was it. Only three or four that I can recall.

Q So the first opportunity you had to report this, you did, which was about what time?

A Shortly after 9 a.m. when I had a chance to see one of my supervisors.

Q That day, sometime during the course of that day you told the United States Attorney about this statement Capra

1 had made to you?

2 A Yes.

3 Q Now, the statement as it reads, "Ming, what are you
4 guys going to do if you take all of us off the street, you
5 guys will be out of a job."

6 I have read it exactly as you have it here, if the
7 government will concede to that.

8 MR. FELD: I will rely on your representation.

9 Q Is that the exact statement he made to you word
10 for word as best you recollect?

11 A As best I recollect, yes.

12 Q Isn't it possible that he said "What are all you
13 guys going to do if you take us off the streets" instead of
14 "What are you guys going to do?" Is it possible there might
15 have been a variation in words as to what your report reads?

16 A Could be.

17 Q When for the next time after this report was sub-
18 mitted did you read the report again, and I'm talking about
19 Defendant's Exhibit I. for identification?

20 A I have seen the report several times since it was
21 written.

22 Q When you say several times, would it be a month
23 after, a week after, two weeks after?

24 A It could have been a week after and then a month
25

1 after, but I have seen it more than once since I have
2 submitted it.
3

4 Q So for the past five months, about five months,
5 from the date of the report, you have seen it about how many
6 times?

7 A Three, four times.

8 Q And who has shown the report to you?

9 A I believe I either went to the file myself, or as
10 of the last day Mr. Feffer showed me a copy of my report.

11 Q When you say you went to the file yourself, why
12 would you go to the file to look up this report? Did some-
13 one tell you you would have to testify with regard to this?

14 A I believe someone said I may have to testify.

15 Q Someone associated with the Department of Justice --
16 I'm sorry, the U.S. Attorney's office?

17 A It may have been one of the agents in the office.

18 Q So you studied the statement. Is that correct?

19 A I looked at it, yes.

20 MR. SLOTNICK: In fairness, your Honor, since there
21 is no jury here, I think the exhibit can go in.

22 MR. FEFFER: No objections.

23 (Defendant's Exhibit I. received in evidence.)

24 Q When you say "see 1-72-697", what does that mean?

25 A That was a case number which indicates the case under

1 which Mr. Capra is listed.

2 Q Now, I have shown this report to you, haven't I,
3 Exhibit I.?

4 A No.

5 Q I'm sorry. Is this Exhibit I, the report you
6 prepared? (handing)

7 A Yes.

8 Q You didn't type it out yourself, did you?

9 A I really don't know. It could have been dictated,
10 handwritten. I really don't know. Most likely it was on a
11 belt, belt recorder.

12 Q And when you were dictating it or writing it out
13 you wrote this exact statement out. Is that correct, to the
14 best of your recollection that is what you said into the
15 microphone or that is what you wrote on your paper?

16 A To the best of my recollection.

17 Q And that was on April 17. Is that correct?

18 A That is the date that the report was typed.

19 Q Do you remember when you wrote the report?

20 A Sometime before the 17th.

21 Q Would it -- it wouldn't be that date of the 14,
22 would it?

23 A No. It was probably the 16th.

24 Q Prior to writing the report or dictating it or
25

1 whatever you did that you don't recollect, anyplace did you
2 write down the statement of Capra?
3

4 A No, I did not.

5 Q You maintained it in your head with you?

6 A That's right.

7 Q That's right whether you doubt these could be the
8 exact words the defendant Capra used when he spoke to you.
9 Is that correct?

10 A In essence that's what he said.

11 Q But they are not the exact words that he spoke to
12 you. Is that correct?

13 A I believe they are as exact as possible.

14 Q However, if you had written them down the moment he
15 allegedly said to you they would have been more exact or
16 you would have said "Those are the words of the defendant
17 Capra"?

18 A That's right.

19 MR. SLOTNICK: Your witness.

20 REDIRECT EXAMINATION

21 BY MR. FEFFER:

22 Q You mentioned the presence of four or five U.S.
23 Attorneys. At the time this statement was made at 9 o'clock
24 in the morning, to your knowledge was there any Assistant U.S.
25 Attorney present in the building?

A No. My recollection is the Assistant United States Attorney didn't get there until later that afternoon.

Q Do you know for what purpose the Assistant United States Attorney went to 57th Street?

A It was the normal advising their clients of their rights and asking them the questions, I believe --

Q The pre-arraignment interview?

A Yes.

Q Did John Capra have an occasion at any time else during the day to address you or speak to you?

A For cigarettes or coffee or talk about his golf game.

Q What did he say with respect to his golf game, for example, if you can recall?

A He wanted to know what was going to happen to his golf game, and I think I might have mentioned to him there were places like Danbury, they have practice ranges or something like this.

MR. FEFFER: No further questions.

RE CROSS EXAMINATION

BY MR. SLOTNICK:

Q Now this report is entitled "Conversation with defendant John Capra." Is that correct?

A Yes.

1 Q This report indicates that during the course of the
2 day, "In the course of his duties special agent Waniewski had
3 an opportunity to converse with numerous defendants."
4

5 Is that right?

6 A Yes.

7 Q One of the opportunities you had to converse with
8 defendant Capra is when he made the statement?

9 A That is correct.

10 MR. SLOTNICK: I would ask the Court if it wants
11 to read the report.

12 THE COURT: If I want to, I will.

13 MR. SLOTNICK: Should I give it back to the govern-
14 ment?

15 MR. REID: I think that would be appropriate.

16 MR. LEVENSON: Before this witness is discharged
17 may I direct a comment to the Court? In the event that this
18 motion to suppress is denied I think a motion for a severance
19 under Bruton would be called for. To better prepare for
20 such a motion I would like to make one or two inquiries of
21 the witness and I think this would help the Court in deter-
22 mining whether or not to grant such a motion.

23 THE COURT: What is it you want to find out?

24 MR. LEVENSON: I want to find out whether my client
25 was in the cell block at the time that this statement was made

1 and whether this officer interpreted that statement to include
2 my client as one of the "us."
3

4 THE COURT: Is that because you don't know or you
5 want to make a record?

6 MR. LEVENSON: I want to make a record.

7 THE COURT: Do you know whether your client was in
8 the cell block at the time?

9 MR. LEVENSON: No, I don't.

10 THE COURT: Your application is denied. Find out
11 and in due course if you need it we will get you the infor-
12 mation.

13 MR. LEVENSON: I think the Court should be apprised
14 of it from testimony of a competent witness. This motion
15 would be directed to that particular bit of information.

16 THE COURT: I want to get through with this hearing.
17 Your application is denied. You make your application on
18 suitable papers. This man is a government agent. He will
19 be available. I doubt seriously whether the premiss is valid
20 anyhow, but you make an appropriate application. We are not
21 going to run this on a casual conversational basis or we will
22 be here all winter.

23 MR. LEVENSON: I am trying to save the Court time.

24 THE COURT: I know you are but you are not succeeding.

25 (Witness excused.)

MR. PEPPER: No further witnesses.

THE COURT: Any further witnesses for Mr. Capra?

MR. SLOTNICK: I don't think so, your Honor. Mr. Capra would request a five minute recess, if possible.

THE COURT: Take six or seven. I will hear argument on this motion right now when we return and I will rule on it.

MR. SLOTNICK: Thank you, your Honor.

MR. STONE: Before you go for a recess, I have had another request from the defendant which I think I will relay to the Court and after recess I will prepare the motion papers which you directed.

Mr. Morris has asked me to request a subpoena from the Court or a notice to the United States Attorney to produce as his witness for a prospective area Agent Mickey Dehook of the Toledo Metropolitan Police Department. My understanding, through Mr. Morris, is that Mr. Dehook was instrumental in testifying in the Ohio case and he believes he will be brought here by the government. If he is brought here by the government as one of their Toledo arresting agents at any time during this proceeding, a formal subpoena would not have to follow. If not, I would have to prepare additional papers, I presume.

THE COURT: Well, what is it you want of me?

1
2 MR. STONE: I am asking whether the government will
3 produce Mickey Dehook.

4 THE COURT: For this hearing which is now in pro-
5 gress?

6 MR. STONE: A hearing which will take place we hope
7 in a matter of days.

8 THE COURT: This applies to defendants as well as
9 lawyers. I understand the problems of having an imaginative
10 client but I don't want any more of this. We are going to
11 run one proceeding at a time if you please. We are now running
12 a whole series, lengthening series of suppression hearings. I
13 don't want counsel to jump up any more in open court and bring
14 on applications for this and that.

15 If you have an application other than something
16 relating to the proceeding in progress, or other than an
17 emergency like someone strangling in his cell, put it in
18 writing. I do not want to impose on assigned counsel, and
19 I realize it's a burden on you, Mr. Stone, but no more of
20 this.

21 (Recess.)

22 THE COURT: All right, I think the most useful way
23 to go at this for assisting me will be for me to hear Mr.
24 Slotnick now on why that alleged statement by his client
25 should not be received in evidence.

1
2 MR. SLOTNICK: Many suggestions, your Honor. The
3 first suggestion that I make to the Court with regard to
4 the alleged statement is that as a matter of law it is not
5 an incriminating statement, it is not an admission, it is not
6 a confession, it is not a statement as a matter of law
7 against penal interests and it is a statement which should
8 not be submitted to a jury.

9 The total contention of the hearing held for the last
10 two days indicates that if the statement was made that it
11 was the type of statement that would have been made in
12 sarcasm, in jest. It was made to the keeper of the keys,
13 actually the man who was to provide comfort and lodging to the
14 defendant, to the man that may have brought them coffee or
15 may have been the reason for them being in an uncluttered
16 cell. As the record in Exhibit I. indicates, it was a con-
17 versation. The heading of the report is "Conversation with
18 the defendant Capra." In the report it said that agent Waniewski
19 in the course of his duties had occasion to converse with
20 various defendants. The statement appears to be on its face,
21 at least at best, inaccurate.

22 The witness had testified he had been working for
23 some nine hours. He had not reduced the statement until some
24 72 hours later; that they may not have been the exact words
25 that the defendant said. I think for a proceeding in which

1 a possible statement of a defendant may weigh that heavily
2 or be that important to a jury, I think the Judge has an
3 obligation as a matter of law to look at it first.
4

5 I repeat, that if the statement was made and your
6 Honor believes that its context is close to be correct,
7 because even the agent testified that in all probability it
8 wasn't the exact words, I think it might loom that important
9 for a jury and it might be troublesome with regard to the
10 defendant Capra. However in the context of all that was said
11 I think he was merely twitting. I just can't see this as
12 being a statement as a matter of law, as a statement against
13 interests.

14 THE COURT: You want me to hold he was twitting as
15 a matter of law. Is that what you are saying? Do you think
16 I would hold a two day hearing to arrive at this jury ques-
17 tion? Go on to your next point, please.

18 MR. SLOTNICK: Your Honor can also see that the
19 answer of the agent was also in turn humorous.

20 THE COURT: I heard it.

21 MR. SLOTNICK: The second point goes to the issue
22 of Laches and which the U.S. Attorney's office indicates they
23 just learned about. How have I been prejudiced by it? There
24 are cases and there are cases of what is known as implied
25 prejudice. The Court of Appeals has a line of questions

1 called implication of prejudice basically relating to speedy
2 trial cases. Suddenly within a month, month and a half of
3 trial, a statement is pulled out alleged to be made by the
4 defendant that I was not aware of that the U.S. Attorney's
5 office was aware of, a statement of April 14, 1973.
6

7 I think it is not just fair to spring it at the
8 defendant at this late stage of time.

9 The other defendants have indicated a possible Bruton
10 problem. If your Honor finds that as a matter of law it is
11 an incriminating statement which should be submitted to a
12 jury, I think we are causing a great problem with regard to
13 the trial. I say that in an advisory capacity.

14 If your Honor finds it is an incriminating statement,
15 it is an admission against interest, I think that we have a
16 severe Bruton problem with regard to the other defendants,
17 and I would fortify my motion for severance, at least for
18 those who made it.

19 The statement is uncorroborated as your Honor well
20 knows. I think that there were certain improprieties that
21 may cause this Court to reach a per se or prophylactic rule
22 and I would offer this on the Court in its supervisory powers.

23 We have had a record of an attorney appearing, of
24 agents being aware of the fact that the man had an attorney,
25 of him being taken. I told the Court at this stage I would not

1 mention the present business but I do in passing, just in
2 passing. I think there were great improprieties with regard
3 to the arrest. I don't know when the indictment came down and
4 I have no idea when it was sealed. I assumed, perhaps in-
5 correctly, that your Honor would have the indictment before
6 him and could take judicial notice of the fact. If the
7 indictment came down two or three days earlier then certainly
8 the entire mass arrest procedure was improper.
9

10 There were many indictments that came down. I
11 believe five or six that came down and even waited for them to
12 be lumped together. If they came down on the same day, that
13 Friday, well I loose the argument. If they came down prior
14 I think Judge Kaufman has indicated an awareness of this mass
15 arrest problem and the disturbance with it and I would tend
16 to agree.

17 I just don't like, being a member of this bar, the
18 mass arrests, the keeping of defendants incommunicado for
19 a period of time. In this case at least one witness indicated
20 it was at least 24 hours, possible longer, and the witness
21 being an attorney.

22 I ask your Honor, after all is said and done, that
23 the statement be excised and suppressed and that finally, as
24 I indicated, I think a prophylactic rule should apply, and on
25 that basis I move the Court to suppress the statement.

1
2 THE COURT: I have indicated my views on the ques-
3 tion of character or meaning or significance of this state-
4 ment. Whether it was a joke or sarcasm, all such questions
5 are for the jury and don't in my view go to admissibility.

6 I reject the Laches point.

7 On this hearing, which in light of what it adds up
8 to, I regret has taken up so much of the Court's time, I find
9 that the defendant Capra was read the warnings required under
10 the Miranda decision, but more important now I finally
11 realize, and really there is no dispute about this on the
12 record, there was no custodial interrogation anyhow, so I am
13 very doubtful that Miranda has anything to do with this pro-
14 ceeding.

15 I find that the statement on the record before me,
16 subject to what the jury may determine, was, on a clear
17 preponderance of the evidence here, blurted out voluntarily,
18 not in response to any interrogation. As to the wisdom or
19 prudence of making a statement like that, I leave that for
20 consideration elsewhere.

21 So with or without reference to Miranda, which I
22 think is probably not apposite, I find the statement is ad-
23 missible and I will leave, of course, to the jury to determine
24 whether it was made, and if so what significance should
25 attributed to it.

1
2 As to the Bruton problem, that seems to me to be a
3 long reach, but I would say, merely for cautionary purposes,
4 that I don't see any reason on the record as I thus far
5 understand it why the government should plan in this context
6 to present any evidence whatever of the other occupants of that
7 cell or those cells at the time of the statement.

8 I assume that the government will not be presenting
9 any such evidence. Is that a fair assumption or do you know?

10 MR. FEFFER: I haven't really thought of it in that
11 context, your Honor.

12 THE COURT: You have to think of it in that context.
13 If you are going to present evidence of the presence of other
14 people in the cell at the time of this alleged statement to
15 agent Waniewski, you had better give me a pre-trial memorandum
16 on that. I don't think it's going to make any difference
17 frankly. I don't think that the 50 or 60 people in that cell
18 could honestly claim a serious Bruton problem on the basis of
19 being locked in that enclosure when somebody made a statement
20 of this kind.

21 I'm not sure.

22 MR. FEFFER: On reflection I think that is good
23 advice and the government will stay away from mentioning other
24 people in the cell whatsoever. Just leave it to Capra alone.

25 MR. SLOTNICK: Your Honor, with regard to the comment

1
2 about the Miranda proposition, there is and there has been
3 written about the so-called Miranda Messiah overlap. That is
4 actually what I was heading into and that is what I thought
5 I had presented in the hearing. Within the context of that
6 overlap, to the extent I understand it, and I have some sense
7 of what you are talking about, I make the same ruling.

8 Now, I think it's time for us to begin the dis-
9 cussion of our minimization problem. Does anybody have any
10 other things to consider before that?

11 MR. FEFFER: Your Honor, the only point, of course,
12 the government has in mind is the standing issue with respect
13 to minimization, with respect to the three affidavits that
14 were submitted by Capra, Dellacava and Guarino claiming
15 ownership of Diane's Bar and the professional and personal
16 use of the telephone therein. That is the basis they have
17 asserted to challenge the wiretap in question.

18 The government has documentary evidence in State
19 organizations and other places to indicate that these three
20 people did not own Diane's Bar at the time. As with the
21 standing issue on the Toledo baggage situation, the government
22 at this time requests that these three defendants be com-
23 pelled to demonstrate, more amply than they have certainly,
24 that in fact Diane's Bar and the telephone therein was theirs,
25 belonged to them in November, December, January and February,

1
2 1971 and 1972. Because as of right now we have three short
3 conclusory affidavits to that effect.

4 THE COURT: Let me understand what this is about,
5 because I am not perfectly clear on it. Assume they have no
6 ownership interest in Diane's Bar, I take it we have a min-
7 imization problem nevertheless because you are going to have
8 wiretap evidence, of what is it, one conversation involving
9 the defendant Dellacava? How many?

10 MR. FEFFER: I think there would be approximately
11 20 conversations.

12 THE COURT: Which you are going to offer in evidence
13 at the trial?

14 MR. FEFFER: That's correct.

15 THE COURT: Of Dellacava?

16 MR. FEFFER: Dellacava, Guarino and Capra. Primarily
17 Dellacava.

18 THE COURT: Now, those you are going to offer whether
19 they claim an ownership interest or not.

20 MR. FEFFER: The point for minimization, and I can
21 refer your Honor to a case in the Second Circuit, for the
22 defendants to have any right to challenge whether the govern-
23 ment minimized telephone conversations over a telephone, they
24 have to either own the premises or have leased the premises
25 or rent the premises where the telephone is located in or have

1 some interest in that telephone. That's the reason that the
2 government suggests why these three affidavits were filed, to
3 confer standing on them for that purpose.
4

5 THE COURT: You mean if a man is overheard through
6 a tap which would not meet the minimization test, he can't
7 attack the tap if he doesn't have an ownership interest in
8 the communication facility?

9 MR. FEFFER: Of course contest the tap. He can
10 contest the probable cause that was utilized in order to get
11 the warrant, in order to get the order to put the wiretap in.
12 But he doesn't have standing with respect to minimization.
13 I can refer your Honor to a Second Circuit opinion directly
14 on point.

15 THE COURT: Which defines standing to somebody who
16 was overheard?

17 MR. FEFFER: Correct.

18 THE COURT: Refer me to that.

19 MR. FEFFER: United States versus Poeta. It is
20 455 F. Second 117, 1972. I can hand your Honor a copy of the
21 opinion or actually the book (handing).
22
23
24
25

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THE COURT: Let me get further focused. I may have to read this at somewhat greater vision.

Which affidavits are you talking about? What is their date? Let me look at them and then let me find out from the affiants or the defendants who make these affidavits what the purpose of them may be.

Are you talking about the affidavit in support of Mr. Feitell's motion to suppress?

MR. FEFFER: In this affidavit, the defendant claims ownership.

THE COURT: Which affidavit are you talking about?

MR. FELD: I think those affidavits were submitted with Guarino's motion papers.

MR. SLOTNICK: The defendant Capra has submitted a separate one dated September 4th, indicating his proprietary and ownership interest.

THE COURT: Now, let's start with that, Mr. Slotnick. Knowing that you are not putting in pieces of paper for fun, I assume that since you have an affidavit here alleging Mr. Capra's ownership interest, it's because you think you need it. I now ask you what is the materiality of his alleged ownership interest?

MR. SLOTNICK: The first thing he has done is to indicate he has been overheard.

1 rdmch 2

2 THE COURT: What is the date of the affidavit?

3 MR. SLOTNICK: September 4th.

4 THE COURT: What is it connected to? I have a
5 rather large pile of papers here.

6 MR. SLOTNICK: I submitted some fifty-some-odd
7 pages of affidavit, your Honor. It's at the end of that.
8 It's subsequent to his applications for severance.

9 THE COURT: It's with your notice of motion
10 dated September 5th, right?

11 MR. SLOTNICK: That is correct, your Honor,
12 served and filed on that day.

13 THE COURT: And the affidavit appears where?

14 MR. SLOTNICK: His affidavit appears towards the
15 end before Exhibit B. It's the last two sheets of paper
16 before Exhibit B, and he acknowledges the fact that he has
17 been overheard on the various wire taps and he acknowledges
18 his interest in Diane's Bar and Steve's Air Conditioning.

19 THE COURT: We are just talking about that last
20 thing. I take it you put that thing in because it's a
21 material allegation, right?

22 MR. SLOTNICK: I put it in for the simple reason
23 that in an abundance of caution I felt that he should be
24 benefited from the total overall lack of minimization
25 rather than the restricted lack of minimization as to

1 rdmch 3

2 himself. It is our contention that if a plan is overheard
3 on a telephone pursuant to a tap under, I think, 2518,
4 he is an aggrieved party and he has a right to move to
5 suppress with all of the same rights as everyone else.

6 THE COURT: Mr. Slotnick, let's talk about one
7 point at a time. Let me ask you to confine yourself to
8 the question that I address to you. You now know what
9 question I'm on and I'm not on any other question. I'm
10 only on the question which Mr. Feffer has asked me to
11 look at of Mr. Capra's alleged ownership interest in
12 Diane's Bar. Mr. Feffer says that is an assertion about
13 a matter of fact and it's a material fact. I'm asking
14 you, is it a material fact, and you said "yes."

15 MR. SLOTNICK: That is correct, your Honor.

16 THE COURT: All right. I think it's the same
17 kind of material fact and I think Mr. Feffer may, for
18 about the second or third time this month, be correct,
19 the same kind of material fact that I have pending before
20 me with reference to the suitcase. It goes to standing.
21 I've now had a case cited to me, with which I was not
22 obviously familiar and it looks as though it's in the ball
23 park. So I now put it to you, why should I not proceed,
24 or maybe you agree I should proceed, as Mr. Feffer urges, to
25 consider at the threshold this standing question and try it

1 rdmch 4

2 out on a factual record.

3 MR. SLOTNICK: The reason that I oppose the
4 repitition of what did occur in the prior hearing, that is,
5 of placing the defendants on the witness stand and having
6 them reswear to what they have sworn to already on a piece
7 of paper, is for the following reasons:

8 Number one, the Government's record is replete
9 with the ownership of Dellacava in Diane's Bar, and it is
10 so done in Detective Eaton's affidavit where he indicates
11 he has information, or words to that effect, that Dellacava
12 is actually the owner of Diane's Bar. The tape recordings
13 themselves, your Honor, indicate that Dellacava
14 operates such a great control over the phone at Diane's
15 Bar there can be no question that he is the proprietor.

16 The testimony that has come before, one from the
17 defendant Guarino who has already indicated that he,
18 Dellacava, and Capra were partners in various enterprises,
19 also Diane's Bar, as he stated. Also the testimony of
20 Capra and Dellacava indicating they have been partners
21 in various enterprises, I think is sufficient for the Court
22 to establish total overall standing for minimization on
23 those phones. There can be, at least to my mind, and
24 perhaps I'm persuaded by what else I may know, which is
25 not on the record, the fact that Capra, Dellacava and Guarino

rdmch 5

were partners in Diane's Bar.

THE COURT: All Mr. Capra refers to is his interest in Diane's Bar and Steve's Air Conditioning. I don't really know what that means. I have an interest in the Brooklyn Bridge.

MR. SLOTNICK: That's bad draftsmanship.

THE COURT: That's all the draftsmanship I have before me.

The Government says it wants to explore that.

MR. SLOTNICK: If your Honor wants to, I can tomorrow present them with another affidavit detailing what the term, "interest," means.

THE COURT: Do you contest this assertion, Mr. Feffer, or are you just trying to --

MR. FEFFER: We have records from state agencies which reveal that the owner is somebody else of Diane's Bar.

THE COURT: Who is revealed in the records you have?

MR. FEFFER: A man by the name of Armando Donato who has put his name with every licensing or regulatory agency that we have talked to, food agencies, liquor agencies. There is no mention of Capra, Guarino or Dellacava on any of these records.

rdmch 6

THE COURT: I just want your legal views on this. If a person has an interest in a bar in New York State in the form of having made a large loan or having acquired a share in the equity, or both of them, does he necessarily have to be shown on some New York State records to have that interest?

MR. FEFFER: Your Honor, I think the representation was made during the course of the last hearing that these three individuals owned Diane's Bar.

THE COURT: That's not what I asked you. You say you have some records that this other gentleman owns Diane's Bar.

MR. FEFFER: That is correct.

THE COURT: Do those preclude these three or some of them having an ownership interest?

MR. FEFFER: In the case of Dellacava and Guarino, yes, because they are prior convicted felons.

THE COURT: You mean they are not supposed to own?

MR. FEFFER: That is correct.

THE COURT: What is it, some violation of some State criminal law?

MR. FEFFER: That is correct.

THE COURT: How about Capra, does he have to show his ownership in some way? Would the State have to have a

1 rdmch 7

2 record of it?

3 MR. FEFFER: It's my understanding, and again
4 I'm not speaking with any great degree or authority,
5 if an individual has an interest in a bar, the papers
6 that are submitted, the application that is submitted to
7 these different agencies must reflect the interest which
8 all people have in that particular establishment, whether
9 it's a partnership that owns it, corporation. In fact
10 we do have, I believe, applications that were submitted
11 in support of these various licenses.

12 THE COURT: Which purport to show the ownership
13 interests fully?

14 MR. FEFFER: Of Armand Donato, yes.

15 THE COURT: Let me ask Mr. Feitell and Mr. McAlevy
16 about the question raised in connection with their clients.

17 MR. FEITELL: Your Honor couches it in terms
18 of its being a threshold question. I don't know if you
19 mean by that that it's dispositive because it seems to
20 me there are two issues that are involved. What I'm
21 looking for in connection with the affidavit that we have
22 submitted over the signature of Dellacava is the broadest
23 form of standard --

24 THE COURT: Don't answer some other question.
25 Please, when I talk to your brother at the bar, listen as

though I mean it to apply to you.

Now, I asked the question and my question was, you just heard him say as a convicted felon, which he alleges your client is or may be, your client is forbidden to own an interest in a bar in New York. Is that correct?

MR. FEITELL: I'll accept that as statement of law without testing it further. It's not dispositive.

THE COURT: Not all my questions are meant to be dispositive. I just ask them anyway. You know what Mao Tse Sung said, "One step at a time." We are all Maoists now, as Dr. Kissinger would say.

My question is, is it essential to your motion that your client claim an interest in this bar and do you persist in that claim?

MR. FEITELL: With respect to the narrowest concerning --

THE COURT: With respect to anything. do you persist in claiming --

MR. FEITELL: If you are holding me, yes.

THE COURT: I am trying to hold you and it's not easy. If so, can you tell me why, since it is a contested question of fact, evidently, we should not simply try it out and get it out of the way because I think it will affect the scope of your minimization claim.

1 rdmch 9

2 MR. FEITELL: Only because there are counter-
3 vailing considerations. If the Court approaches the question
4 with some, as I'm sure it will, sensitivity to the
5 countervailing interests of defendants in a criminal case,
6 utilizing the Fifth Amendment rights, staying off the stand,
7 not necessarily making themselves unnecessary targets,
8 the Court could ask itself additionally whether there is
9 something in the Government's papers or elsewhere in the
10 record that is going to otherwise -- which would indicate
11 a fact of ownership. That touches right alongside the
12 question of good faith.

13 I'll withdraw that; I know your Honor is very
14 sensitive about any claims we make about good faith.

15 I'll say this: There is sufficient in the
16 papers turned over to us by the Government and the taps
17 recordings that we have heard to very clearly indicate
18 Stephen Dellacava's ownership in this bar. Without respect
19 to any such thing as a prima facie showing of records that
20 may be reposed in some State file somewhere as to who the
21 licensee of record is. The Court is very well experienced
22 in these matters and have doubtless heard of other cases
23 where individuals have sub rosa interests in properties.

24 The Government in its affidavits on which it
25 relies, particularly Detective Eaton's, surely takes the

1 rdmch 10

509

2 position --

3 THE COURT: Where is this statement in Detective
4 Eaton's affidavit?

5 MR. FEITELL: Paragraph 9, Page 17 of the
6 first Havermeyer application, your Honor.

7 THE COURT: Read it to me, please.

8 MR. SLOTNICK: That would be my Exhibit G, Judge.

9 THE COURT: Let me look at Exhibit G.

10 MR. MCALEVY: I can read it but you will have
11 to bear with me because the copy that was furnished by the
12 Government was almost illegible. I might say the part
13 concerning Mr. Dellacava's ownership is quite clear. Perhaps
14 the Government has a clearer copy.

15 MR. FELD: Give me the paper over again.

16 MR. MCALEVY: Page 17, Exhibit G.

17 MR. SLOTNICK: "Secretly owned by Dellacava."

18 Your Honor, that is the last paragraph from the
19 bottom. May I read it?

20 THE COURT: Yes.

21 MR. SLOTNICK: "On that occasion John Capra entered
22 Diane's Bar, 2034 Second Avenue, secretly owned by Dellacava."

23 Page 17, your Honor.

24 MR. MCALEVY: That's the affidavit dated September 8,
25 1972, your Honor.

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rdmch 11

THE COURT: I have something marked Exhibit G.
It says, "Whitestone Warrant No. 1."

MR. SLOTNICK: I'm sorry, your Honor, then it's
Exhibit F.

THE COURT: What about that, Mr. Feffer?

MR. FEFFER: I have no idea on what information
this was based.

THE COURT: Whatever information it was based
upon, it was a sworn statement by a Government official
given to a judge as a basis for the eavesdropping letter
on which you are now going to proceed to rely.

MR. FEFFER: That is incorrect. We are not
relying on this affidavit; we are not relying on any of
the telephone conversations that came from the phone that
was tapped. I believe this was a bug, a room bug in the
Havermeyer Club. This is a separate affidavit which the
Government does not intend to get involved with at all.

THE COURT: Detective Eaton made this affidavit?

MR. FEFFER: That is correct, your Honor.

THE COURT: Who issued an order based thereon?

MR. FEFFER: The Judge, your Honor, of the Supreme
Court -- it's not clear on our copy, the name of the Judge.

THE COURT: Does Detective Eaton play any part
in the issuance of the order by, I think it is, Judge Burns?

1 rdmch 12

2 MR. FELD: Yes. It was upon his affidavit
3 that the order was granted.

4 THE COURT: It strikes me that for this kind
5 of threshold question where there is the delicacy of
6 privileges and possible incrimination, a plausible claim
7 of ownership may well be enough since we have certain
8 Fourth Amendment interests that we care about anyway.
9 Why should I have to try this out instead of just taking
10 this sort of prima facie case in and say it shows enough of
11 an interest, to see whether the Fourth Amendment has been
12 neglected here?

13 MR. FEFFER: It would certainly not give Capra
14 and Guarino standing but it may hold for Dellacava
15 if that is your Honor's ruling.

16 MR. FELD: The practical length of the hearing
17 if we only have Mr. Dellacava's counsel participating --

18 THE COURT: Do you want to withdraw your contention
19 with respect to Mr. Dellacava?

20 MR. FEFFER: I don't think so. I think in view
21 of the records that the Government has in its possession
22 which establishes more than conclusively that the legitimate
23 owner, or at least the individual that has his name up
24 for various licenses, is not one of the three defendants.
25 I think that these defendants should not come into this

1 Court and expect the Court to indulge in a very lengthy
2 proceeding based on that type of a record.
3

4 THE COURT: I expect you to show me a way to
5 avoid being in a lengthy proceeding. But, apart from
6 that, where now does Mr. Dellacava swear in the papers
7 before me that he has an ownership interest in Diane's
8 Bar?

9 MR. FEITELL: In the notice of motion submitted
10 by Mr. McAlevy, which I had my client, after a consultation
11 with him, supply an affidavit.

12 THE COURT: I'm having a little trouble, as
13 you can see, keeping these papers straight.

14 MR. McALEVY: Your Honor, maybe I can aid the
15 Court. With my motion papers, I filed an affidavit of
16 Stephen Dellacava. Attached to that affidavit was an
17 affidavit of my client, Mr. Guarino, and an affidavit of
18 Mr. Capra. The Dellacava affidavit is the one which sets
19 forth, and I quote, "Each of us had control over the
20 premises in which the bar and air conditioning premises
21 was located" -- I'll start from the beginning.

22 "Number two, Diane's Bar and Steye's Air
23 Conditioning were, during the period of surveillance,
24 owned by myself and defendants Capra and Guarino. Each
25 of us had control of the premises in which the bar and air

1 rdmch 14

2 conditioning business was conducted."

3 THE COURT: Now, that is a rather conclusory
4 affidavit, but I think I'm going to adopt a kind of middle
5 position. I'm not delighted about having them get on the
6 stand now to testify about their ownership interest. I'm
7 also not delighted they should be able to play fast and
8 loose with different governments at different times.

9 If they are forbidden by State law to own this
10 bar, which people seem to assume arguendo is so, and it
11 then becomes convenient for them to claim ownership for
12 the purpose of asserting some federal interests, I think it
13 unsatisfactory that they should have it both ways.

14 Therefore, for purposes of my hearing, I'm going
15 to adopt a middle course. I will allow you to put in an
16 affidavit, each of you, sworn by your client, specifying
17 with particularity the origin, the nature, and the extent
18 of his ownership interest in Diane's Bar. I will find
19 that sufficient to give them standing under the doctrine
20 of this case that Mr. Feffer has cited to me, without trying
21 out the truth or falsity of those assertions any further.
22 I think I can make that sort of rough accommodation on the
23 two grounds that, first, none of us is going to live
24 forever and we have to complete this proceeding some day;
25 and, second, it should be sufficient for my purposes, and

1 rdmch 15

2 I'm worried primarily about the Fourth Amendment, if
3 they are willing to assert this kind of ownership interest
4 in the face of the pains and penalties they may
5 confront elsewhere, sufficient for me to say I'll take
6 that and try out the privacy problem and let somebody else
7 worry about whether they should pay any penalty for that
8 ownership, if it's elicited.

9 Now, can I have such affidavits by tomorrow? If
10 I can, we will proceed with other aspects of this subject
11 starting now.

12 MR. SLOTNICK: Your Honor, I would respectfully
13 request, since it's 4:00 o'clock, that we break early
14 today. I know the other attorneys have been working as
15 late as I have, perhaps even later, and we are all sort of
16 dogging and get to work with our clients and prepare this
17 affidavit and have it for your Honor at 10:30 so we can
18 commence with an orderly proceeding.

19 What I'm asking for is a break.

20 THE COURT: Is that agreeable to the rest of
21 you?

22 MR. McALEVY: To the defendant Guarino, your
23 Honor.

24 MR. FEITELL: To the defendant Dellacava.

25 THE COURT: We will quit early today. We will.

quit about 4:30 because I want to see if we can at least get some other preliminary questions out of the way, none of which will be very strenuous to any of you, and some of which may help me to move along a little more speedily in this case.

I'm not at all clear I'm going to cover all the questions, but even the correct ones, but you will raise the correct questions in due course after I have raised some of those that concern me.

First, there was in the initial brief of the Government some learning, including references to and quotations from Judge Pollack's recent opinion in *Beiner*, on the question whether there is, for purposes of this subject a distinction to be drawn between recording and monitoring. Whether one might and the other might not constitute interception within the meaning of Section 2518.

It is my impression, possibly erroneous, that as a result of later papers filed by the Government, that question has disappeared from this proceeding. Because I then am given to understand that -- or misunderstand, that monitoring and recording were coterminous in this case. If they were, I don't have to worry about the difference between them.

Now, is that later impression correct and is that

1 rdmch 17

2 earlier issue out of the case?

3 MR. FELD: Yes, your Honor.

4 THE COURT: So either recording or monitoring,
5 as far as this proceeding is concerned, can be considered
6 to be interception?

7 MR. FELD: Yes, your Honor.

8 THE COURT: All right.

9 Now, as I understand it, the eavesdropping order
10 or the wire tapping order -- what is the correct name for
11 this kind of an order?

12 MR. FELD: Under the New York State statute I
13 think it's referred to as an eavesdropping warrant. In
14 the federal court it would be an order, but I think the
15 "warrant" or "order" are interchangeable for our purposes.

16 THE COURT: The eavesdropping warrant that is
17 going to concern us most immediately, the one at Diane's
18 Bar, authorized interception of conversations to which
19 one Mr. DellaValle was a party. Then I understand that we
20 are going to have conversations offered in evidence here
21 between persons, none of whom or neither of whom was
22 DellaValle.

23 MR. FELD: That is correct.

24 THE COURT: The Government claims that it will
25 demonstrate the propriety of those overhearings..

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2 THE COURT: What will be the nature of that evi-
3 dence?

4 MR. FELD: We propose to put on monitoring officers
5 who will testify with respect to the difficulty of identifying
6 Della Valle's voice, of the very brief nature of the conver-
7 sations that were overheard many times which prevented them
8 from conducting voice identification or discerning who was
9 speaking on the phone. And the discovery at one point in the
10 investigation, which is detailed in Detective Eaton's second
11 affidavit to the amended order, where it was believed that
12 Della Valle was a co-conspirator of Dellacava and that as a
13 result of listening to a certain conversation it was decided
14 to amend the order. And that the circumstances surrounding
15 that amendment and how Detective Eaton brought it to the
16 attention of the District Attorney would be something that
17 should be explored at a factual hearing because in the
18 second Diane's Bar order, Dellacava is named in the order and
19 conversations in which he is a party are authorized to be
20 intercepted.

21 THE COURT: You are not planning to offer any of
22 those here, are you?

23 MR. FELD: Yes, your Honor.

24 THE COURT: You are offering conversations from
25 the two Diane Bar or authorized by two Daine's Bar orders?

2 MR. FELD: Yes.

3 THE COURT: All right.

4 MR. FELD: It is an extention and amendment order,
5 your Honor. You have copies.

6 THE COURT: I haven't read everything in this file.
7 I had better confess that to you if it isn't perfectly clear,
8 and you will have to help me as I go along.

9 Then there is a question raised as to the failure
10 of the defendants to receive notice. One of the answers is
11 that Justice Birns authorized postponement. I take it that's
12 a factual contention and that the authorization you will have
13 before me.

14 MR. FELD: We will have evidence relating to that
15 fact.

16 THE COURT: An order of some kind?

17 MR. FELD: It is more complicated than that.

18 THE COURT: Again it is a question of fact?

19 MR. FELD: Yes.

20 THE COURT: I will want to know whether or not the
21 government establishes that, what prejudice there is from the
22 postponement of notice or the delay from giving notice and
23 I guess I want to know as a matter of law whether the argu-
24 ment for the defense failes in the absence of a finding of
25 prejudice. That is the government's contention. I am not sure

1 I understand the full response of the defendants to that but
2 I think that is in the case and I want to cover that.

3 The government says it will prove that the tapes
4 were sealed and how they were sealed. Again that is going to
5 be a subject of evidence, yes?

6 MR. FELD: Yes, your Honor.

7 THE COURT: Then I suppose that these minimization
8 instructions, of which someday some of us will perhaps get
9 a legible copy, are going to be in evidence and are going
10 to have to be considered by me as part of the question of
11 reasonableness or unreasonableness. I am not clear whether
12 I have from the defendants any particularization of the view
13 that the instructions are deficient. Have you urged that,
14 that the instructions are deficient, the written instructions?

15 MR. FEITELL: I for one intend to take it up in the
16 course of examination but I haven't set it forth in terms
17 in our papers which were filed before we recently received
18 this copy of this very illegible document drafted by Mr.
19 Fishman. I think we have that.

20 THE COURT: You will take it up in the course of
21 this hearing?

22 MR. FEITELL: Yes, your Honor.

23 THE COURT: All right. Then I suppose we will be
24 told in the course of the hearing how the instructions were
25

1 delivered to those who were to be governed by them and what
2 they did about them.
3

4 MR. FELD: Yes. As a matter of fact we intend to
5 call Mr. Fishman who is the Assistant District Attorney in
6 charge.

7 THE COURT: The only other preliminary things I
8 have are trivial. I assume that somebody early on will give
9 us some orientation in the technology of this business;
10 that is, how the recording equipment works, when it is on, when
11 it is turned off, how it is on, how it is turned off, and
12 so on.

13 Now, those are the only questions, several of them
14 involving the presentation of evidence, that I have as pre-
15 liminaries prior to the awful prospect of listening to these
16 tapes. I don't know to what extent you all feel that the
17 analyses of the two sides are materially different that I have
18 to resolve issues of fact about them. But I gather from a
19 quick look, and I will take a slower look before tomorrow,
20 that you do have a wide discrepancy from your views of pro-
21 portions that were pertinent, the proportions that were ter-
22 minated, and so on. I also think that just taking Diane's
23 Bar alone it adds up to what, 40 hours of tapes?

24 MR. FELD: 32 hours approximately.

25 THE COURT: The way Mr. Slotnick likes to work

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2 will be 13 trial days; it might be less if we press him. It
3 is a lot of time. I don't think I will listen to 32 hours
4 of tapes, and I now advise the defendants that I will not
5 and the record shows my purpose not to. If that is in error,
6 you have it delivered as explicitly as I can present it. But
7 I ask you to take on this obligation in connection with that
8 determination. I ask the defendants to contrive, in the
9 next day or so, a formulation of the best and most efficient
10 sampling technique they can think of that will vindicate their
11 contentions about the impropriety of the procedures followed
12 in this wiretapping business.

13 I want you to give me, and you can write it down
14 together or separately, a formula for a sampling scrutiny or
15 audition of these tapes which you think will serve to show the
16 basic points you want to make concerning the unfairness, the
17 unreasonableness of the conduct of these eavesdropping of-
18 ficers in connection with Diane's Bar.

19 I don't think you have done that. I am not saying
20 you had to, but before you go on and do it, am I correct in
21 saying the defendants have not thus far suggested any such
22 feasible or limited approach to the problem of listening that
23 the Court must undergo.

24 Mr. Feitell.

25 MR. FEITELL: We have ordered to the greatest degree

possible those conversations which we think are offensive. They are virtually at our fingertips. They could consume considerable portions of the Court's time, selective though they be. Your Honor talks about a formula. The only formula is you have to sit down with the attorneys who will have to sit down and select specific conversations from specific tapes and tax your Honor to them and see how your Honor responds to them and see what the value of them is.

THE COURT: If you have 32 to 40 hours of listening and you find, as an advocate for the defense, 30 minutes that is offensive, that is 164 from 180, and you can just say to the Court there is outrage in that percentage of this and that is what we are telling you, and you can listen to the 30 minutes. That seems to me obviously not to be satisfactory to anybody, not to the defense, not to the prosecution, because it has to be put in context. Now, that is a job of creative lawyering, on which I think you younger and more energetic people should be set to work. That's the job I am assigning you to do, is figure out how much listening I have to do to make fairly, from your point of view effectively, the adversary points you want made and presented to me. I have in mind very simply if we get a couple of hundred more judges in the next year or two the Courts of business if we are going to spend our time listening to thousands of hours of wiretaps

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2 under this section 2518. I don't think we should do it.
3 Until I am instructed that we must, I won't.

4 You have to try some manageable way to conduct
5 this inquiry so that the substance of your clients rights is
6 preserved and the Court supervises both at the same time.

7 MR. FEITELL: We should single out as many as your
8 Honor would be willing to hear which we consider offensive and
9 which won't overburden you.

10 THE COURT: I tried to say more than that. I tried
11 to say, single out the offensive ones and give me a setting
12 in which to hear them that makes your point fairly. And
13 perhaps I am going to have to ask you to present your menu
14 of listening to the government and maybe they will put in
15 additional portions and I will hear the whole business when
16 we get it down to manageable size.

17 MR. FEITELL: We will be concentrating on Diane's
18 1 and 2.

19 THE COURT: Subject to being thought better, it seems
20 to me that all that is going to happen in advance of this
21 trial is that I am going to rule on the motion to suppress,
22 the things allegedly overheard under Diane's Bar orders 1
23 and 2 on the understanding that is the only things the gov-
24 ernment means to offer at trial. Is that a correct under-
25 standing?

1 dsk
2 MR. FELD: That is a correct understanding.

3 THE COURT: Now, as to the motion to dismiss the
4 indictment, because of non-minimization, I am almost ready
5 to deny that now out of hand. But if necessary, in some
6 halcyon day next spring, I will reconsider it, if necessary.

7 As to possible problems of taint relating to other
8 wiretappings, I have the same general view. I will not try to
9 cope with those pre-trial. I don't think a judge intelligently
10 can, or at least I can't. The best way to decide taint, it
11 seems to me, is to let the government be warned that if they
12 should someday get a conviction on tainted evidence it won't
13 stand up, and then look at alleged problems of taint after
14 they have used the evidence that is asserted to be tainted.

15 I am not positive that is correct but that is the
16 way I plan to approach this problem, especially since, as I
17 understand it, the motions to dismiss on minimization ground
18 did not come in until this month. Is that a correct under-
19 standing?

20 MR. FEITELL: Until September 5 when your Honor
21 gave us permission to file them.

22 THE COURT: That is this month.

23 MR. FEITELL: Yes. No Laches involved.

24 THE COURT: I never use Laches in criminal cases
25 until I heard it from Mr. Slotnick. It is not a question of

1 Laches, it is a question of fair compliance with your time
2 prescriptions as to the making of motions. You may remember
3 some judge long ago made a prescription about a time for
4 motions. The fact I extended it doesn't mean we must postpone
5 this trial for a couple of months to try out taint questions
6 or a motion to dismiss the indictment.
7

8 We may someday try them. That's the only relevance
9 of September 5. If you have a tainted conviction I am not
10 at all sure you are foreclosed but I am not at all sure the
11 question is open, we will have to look in later.

12 MR. SLOTNICK: So the record is clear, I am sure your
13 Honor recollects your Honor's order of July 30. You indicated
14 that I could further proceed on the motion to suppress. At
15 that time we knew your Honor was taking the August vacation and
16 if I can read the paragraph into the record, if you want me
17 to I will.

18 THE COURT: You don't have to read that at all. I
19 said I am going to hear the motion to suppress.

20 MR. SLOTNICK: Thank you.

21 MR. FEITELL: Mr. Feld seems to have gotten a quick
22 foothold by the Court by suggesting to you that he doesn't
23 intend to adduce proof at the trial directly relating to
24 28 orders not before your Honor that there is no minimization
25 question relating to those orders. When I suggested to your

2 Honor that we would work on Diane's 1 and 2 in terms of pulling
3 out material that would be of interest to you, I was suggest-
4 ing in terms of judicial economy I don't intend to forego
5 the argument, subject to your Honor's approval, that the issue
6 of minimization has to also be considered in connection
7 with this huge parade of orders, which the government says it
8 is not going to directly rely upon.

9 THE COURT: Why do I have to consider that?

10 MR. FEITELL: Because the indictment in this case
11 inevitably grew out of a product of those orders.

12 THE COURT: That goes to a thing which I said is
13 postponed to some other day, which may never come, a post-
14 trial concern. I thought I made it clear. If you have
15 some cogent reason why that must not or may not be postponed
16 I will hear you.

17 MR. FEITELL: Minimization is a little different
18 than taint but it is the kind of ineffective material that
19 goes against the values of the statute and I just wanted your
20 Honor to understand if you are talking with taint, that is
21 good but I am talking about minimization and that might be
22 slightly different.

23 THE COURT: Minimization for what? I thought you
24 just said in terms of whether the indictment is valid. As to
25 these other taps, let's be sure we understand each other,

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from which the government does not propose to adduce evidence,

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why should I now consider the adequacy of the effort to

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minimize? Answer that, please.

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rdmch 1

MR. FEITELL: Well, if your Honor's assumption is correct that the Government's proven it, I'll await the date as long as I have the time and the opportunity at some time and I know that your Honor will consider it if it becomes relevant in connection with these legal motions.

THE COURT: The only reason I'm hesitating is I'm not sure I understand you. I figure I ought to understand you because you might be right, and then I ought to do what you want me to do. I don't know what you are asking me to do.

MR. FEITELL: Perhaps as the hearing develops and the point peaks up from time to time, your Honor may see it in a different light against the background of how the case is developing. I don't know that we should waste any more time on this.

THE COURT: Okay.

MR. FELD: I have one point to make, your Honor. The defendants in their motion papers charge perjury in the first affidavit submitted in support of the first Diane's Bar order. It appears to indicate they wish to use this hearing for purposes of exploring what is set forth in the four corners of the affidavit. Now, I don't believe that they have made any sufficient showing to warrant

1 rdmch 2

2 such a hearing, and we set forth the authorities on that
3 in our memorandum of law, your Honor. I think that the
4 issue which we ought to be considering are those relating
5 to execution of these orders, and that the hearing be
6 confined to those issues.

7 THE COURT: Well, we still have five minutes on
8 this preliminary discussion and I'm willing to consider
9 that. There was a suggestion in the papers that the
10 bases for these charges of perjury should, for some reason
11 of safety or prudence, be given to me in camera. I didn't
12 understand what anybody proposes to give to me in camera.

13 MR. SLOTNICK: We have in our memorandum submitted
14 to the Court this morning laid out basically to a certain
15 extent the allegations that we charge are perjurious.

16 THE COURT: What is it you want to tell me in
17 camera?

18 MR. SLOTNICK: Detective Eaton in his affidavit
19 for the first Diane Bar -- for the second Diane Bar and
20 also the first, indicates he overheard the voice of
21 Joseph Della Valle and Joseph Della Valle is to be heard
22 on Diane's Bar. He does record a conversation that he
23 relates to be of Joseph Della Valle. Your Honor, we have
24 heard the recording that he has presented or in his
25 affidavit that indicates it's Joseph Della Valle. No way,

rdmch 3

no how, could that possibly be the voice of Joseph Della Valle. At the time Detective Eaton makes this statement he is recording Joseph Della Valle at home. I'm not saying he was home that exact moment, but he has a sufficient comparison. If your Honor will listen, and one of the things we will offer to your Honor, is to listen to the contrasting voices, so that you can see that the one conversation that Detective Eaton indicates Joseph Della Valle is overheard on the Diane Bar is completely untrue.

Most of the defense, the three of us, at least, for Dellacava, Guarino and Capra, have listened to Joseph Della Valle, have listened to tape recordings of Joseph Della Valle played contemporaneously with Detective Eaton's affidavit, we have listened to what he alleges to be Joseph Della Valle and we would like your Honor to listen to that and make your own decision as to --

THE COURT: First, are you going to put on evidence that Della Valle couldn't have been the one that made these?

MR. SLOTNICK: Well --

THE COURT: Let's see what happens after you put it on. All I'm going to say at this moment, as I understand the law, you can't controvert an affidavit in support of a search warrant simply by standing up and

1 saying it's perjury. But if you make a substantial or
2 colorable or meaningful showing by evidence of some
3 basis to believe there may have been perjury, then without
4 sticking to particular adjectives I use, substantial or
5 whatever, at some point the question ought to be tried
6 out. So you will tell me what you have shown and then I
7 will consider whether I'm going to consider perjury.
8

9 MR. SLOTNICK: We can, your Honor, in the same
10 way Judge Bauman did during the so-called JDL hearings
11 say for the purpose of the minimization hearing we can test
12 this out and someday say to your Honor during the course
13 of the hearing or at the end of this coming hearing,
14 Detective Eaton said so-and-so, this actually happened,
15 therefore, it's untrue, attacking the face of the warrant.
16

17 MR. FELD: Your Honor, my concern is this:
18 Detective Eaton is going to testify here. It seems to
19 me that we ought to confine ourselves to what happened
20 after December 8th when the order was executed that
21 things were being monitored. What counsel, if I understand
22 him correctly, proposes to do is to go into detail about
23 what happened prior to December 8th, which is set forth
24 in the order and he has made no showing to justify such
25 a hearing.

THE COURT: He says he is going to make a showing.

rdmch 5

MR. FELD: If he does, we should have a separate proceeding to deal with that if he makes such a showing.

THE COURT: I don't care whether it's separate or not. When he is about to make the showing, which is a matter of evidence, he will proceed to try to make it. If you have an objection, I will hear it.

Look, I'm not going to subdivide this motion to suppress. I think, though, we have a fancy new word for it, minimization, essentially we are hearing a Fourth Amendment type motion. We are hearing a motion to suppress evidence as obtained in violation of Fourth Amendment rights. One way you can try to suppress is to plan that the affidavit in support of a certain order was perjurious. All I'm saying is that before you can get a hearing on that, you have to come forward with some showing that there is a case of that.

MR. FELD: That is what I'm saying.

THE COURT: Mr. Slotnick says he is going to come forward with that.

MR. SLOTNICK: I hope so.

THE COURT: If he hadn't said that -- I'm quite sure he did.

MR. SLOTNICK: That's what I have said.

1 rdmch 6

2 THE COURT: Any other kind of ground rule problems
3 that you want to tell me about so we know where we are
4 going?

5 MR. SLOTNICK: I would ask one thing, your
6 Honor. We have with regard to the audition business and
7 listening to tapes, I will say that your Honor's request
8 some two weeks ago caught me very short, I spent a lot of
9 the summer listening to tape recordings. I was wondering
10 whether the logs have it keyed into some sort of a
11 counter so we can find the conversations as precisely as
12 possible.

13 MR. FELD: The answer is no. We don't have logs.

14 THE COURT: There is no way of coordinating
15 the logs with the tapes. If you have a logged conversation
16 between "X" and "Y," you have no way of knowing where to
17 go.

18 MR. FELD: Yes. But it's not on a counter number.

19 THE COURT: Do you have a methodology?

20 MR. FELD: Yes. Knowing which day a conversation
21 is according to the log, we can then refer to the appropriate
22 tape.

23 MR. FEFFER: No, your Honor. I think, as far as
24 I understand, the logs do not reflect individual tapes.
25 If you read the logs you get the days and the times and

rdmch 7

the subject of the conversation.

MR. SLOTNICK: They do reflect the tapes.

MR. FEFFER: The tape number?

MR. SLOTNICK: In cases they do not. In the Della Valle wire they do not. I'm not sure about the Diane's Bar wire.

MR. FEITELL: Diane's Bar, do you get the reel number and the date and the time but you don't get the counter number?

THE COURT: What is the meaning of "counter number"?

MR. FEITELL: There is a little wheel that's like an odometer. It indicates how many inches into the reel you have progressed. Each reel goes for about two hours. Now, we may have a conversation within the first half-hour, and in order to zero in on it, it would be helpful if we knew. The counter would reveal that.

MR. SLOTNICK: For Mr. Feffer's information, your Honor, Diane's Bar logs do indicate which reel the conversations are on.

MR. FEFFER: But the reels, as indicated, are two hours long. I think counsel is going have to, if they wish to pinpoint conversations, is going to have to make that comparison between log and number on the tape

1 rdmch 8

2 recorder themselves so they can do it expediently.

3 The Government will likewise have to do the same thing. We
4 are going to have to go through the reel of tape and take
5 the number off the machines to get to it very quickly
6 That is the counter of the machine.

7 THE COURT: What do you suggest I ought to do
8 about that, Mr. Slotnick?

9 MR. SLOTNICK: Extend the day, your Honor.
10 It becomes a yoeman job.

11 THE COURT: If you prepare an order, I'll sign
12 it.

13 MR. SLOTNICK: It becomes a rather yoeman job.
14 I had assumed the Government had the counter numbers
15 together with their logs. We will do the best that we
16 can. I guess we have no alternative.

17 THE COURT: I'd urge you, though I don't know that
18 this is going to be very effective, to consider sitting down
19 lawyer to lawyer and talking about this. This is a subject
20 that I think is going to deflect a lot of people from
21 going to law school if we don't learn how to make it
22 more manageable than it is now. I think the Government has
23 a great interest in trying to make the technology of this
24 effort available for both sides, and, incidentally, for
25 the judges. I'd like you to see if you could think together.

rdmch 9

I don't even know how to turn on the phonograph so I'm not very good at mechanical equipment. I'd like you to think together, you have played with the tapes, about how you can work out a technique for zeroing in on particular conversations and try to help each other. Then you fight about the legalisms all you like.

MR. FELD: We have selected conversations.

THE COURT: Try to help each other to handle this mechanical job.

MR. FELD: We will do our best.

THE COURT: Because, in the end, I'm really going to press you to sit down together and put together one program of listening to which I will devote some reasonable amount of time, like one court day, and I will listen to this joint performance and you will present to me all the things you want to argue from that effort. You can quote anything you like. I'll read anything you want to write down. But I will not spend a week or two here listening to these tapes, because I assure you that I will have stopped thinking about them on about the second day and it's a silly kind of a project for judges to engage in.

So that's the idea. I want to hear your arguments, I want to decide the questions, but I want to

rdmch 10

537

work at it within the limits of the energy and attention and that's the way.

MR. SLOTNICK: We have, and I speak for the defendants, pretty much an idea -- I would say we have an idea of the conversations that we are interested in. Our problem is finding them.

THE COURT: All right.

Mr. Feld has generously said he would help you any way he could.

10:30 tomorrow morning.

(Adjournment taken to September 20, 1973 at 10:30 a.m.)

9/20
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DeS/lv

538

1 UNITED STATES OF AMERICA

2 vs.

73 Cr. 460

3 JOHN CAPRA, LEOLUCA GUARINO,
4 STEPHEN DELLACAVA, ROBERT JERMAIN,
5 GEORGE HARRIS, EARL SIMMS,
6 ALAN MORRIS, JOSEPH MESSINA, and
7 CARMELO GARCIA

September 20, 1973
10:30 a.m.

8 (In open court.)

9 THE COURT: Are we ready to proceed?

10 MR. FEFFER: We were handed a copy of the affidavit
11 of Stephen Dellacava, John Capra and Guarino. We would like
12 a few moments to look at it and read it.

13 THE COURT: You may do that during the recess. Let's
14 proceed with the evidence you want to put in on the minimi-
15 zation hearing.

16 MR. FEFFER: One other preliminary matter, Clifford
17 Fishman who would luckily be the first witness is on trial
18 himself today. He will be available tomorrow morning, so we
19 are going to call Mr. John Hill first and would like permission
20 to call Mr. Fishman tomorrow morning. It may be out of order
21 somewhat, but would fit in at the end.

22 MR. SLOTNICK: No objections, Your Honor.

23 THE COURT: All right.

24 J O H N H I L L, called as a witness on behalf of the
25 Government, having first been duly sworn, testified as follows:

Hill-direct

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1 THE WITNESS: Lt. John J. Hill, New York City Police
2 Officer.
3

4 DIRECT EXAMINATION

5 BY MR. FEFFER:

6 Q Lt. Hill, how long have you been with the New York
7 City Police Department?

8 A Next month it will be 17 years.

9 Q And what is your present position?

10 A Executive officer of the Detective Division's Auto
11 Squad.

12 Q I want to direct your attention to November, December,
13 1971, what was your position with the New York City Police
14 Department at that time?

15 A I was in charge of Squad B of the S.I.U.

16 Q What is the S.I.U.?

17 A Narcotics Division of the New York City Police Depart-
18 ment.

19 Q At that time there was an application made to intercept
20 telephone conversations of a Joseph Della Valle relating to
21 narcotics over telephone number 722-9595, located in Diane's
22 Bar and telephone 829-6406 located in a residence in the Bronx?

23 A Yes, I did.

24 Q Pursuant to this application was an order issued to
25 that effect?

Hill-direct

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2 A There was.

3 Q Did you have prior experience in supervising investi-
4 gations in which wiretapping was utilized?

5 A Yes, I did.

6 MR. SLOTNICK: Objection, Your Honor.

7 THE COURT: On what ground?

8 MR. SLOTNICK: His prior experience is irrelevant
9 to this wiretap.

10 MR. FEFFER: Your Honor, I'm trying to bring out that
11 this officer has supervised monitoring officers on prior
12 occasions and therefore instructed his men on how to monitor
13 based on this prior experience.

14 THE COURT: I'll allow it.

15 Q Approximately how many such prior investigations?

16 A About ten.

17 Q Based on this experience did you give the officers
18 in your group certain instructions on how to monitor the wire-
19 tap conversations at Diane's Bar?

20 A Yes, I did.

21 Q Can you tell the Court basically what these instruc-
22 tions were?

23 A I instructed them that whenever they were present at
24 the wire initially that they would sign in when they turned the
25 wire on. If they left for any reason, that they had to turn

Hill-direct

1 the wire off and so place in the news; that if they heard any
2 privileged conversations such as husband and wife, lawyer and
3 client, subject and clergy, that they would immediately turn
4 the wire off.
5

6 Q Now, did you discuss with them the manner of listening
7 to the subject's voice only?
8

9 A I spoke to them and I told them that at the begin-
10 ning they would have difficulty identifying the subject's voice
11 so they would have to listen a little longer at the beginning
12 to find out who was speaking to whom.

13 Q Now, did you also discuss with your officers what
14 should be done if they overheard conversations relating to
15 other crimes?

16 A If they heard of anything relating to another crime
17 or they didn't understand, they were to call me immediately and
18 then I would notify the District Attorney or I would have Det.
19 Eaton notify the District Attorney.

20 Q Did you discuss with them if they should overhear
21 other people who were not named in the order discussing nar-
22 cotics?

23 A If they did that, they would notify me immediately
24 and I would instruct them to notify the District Attorney to
25 amend the ex parte order.

Q Now, can you tell the Court approximately--withdrawn.

1 During what hours did your men work on the Diane's
2 Bar wiretap in monitoring conversations?

3 A It fluctuated from day to day. It depended on logis-
4 tics, how many men I had available; when the bar closed they
5 would turn off the wire, whatever hour the bar closed, when
6 our subjects would leave the premises and they would maintain
7 surveillances, I told them they could turn off the wire and go
8 home. It was varied. No specific hour.

9 Q No 24-hour surveillance?

10 A No, sir. There were, I believe, at times 24 hours
11 but it wasn't the routine.

12 Q Do you recall the hours when your men left the moni-
13 toring plant each evening? Generally.

14 A Generally when the bar closed.

15 Q I want to direct your attention to December 8, 1972.
16 On that date did you have occasion to meet with Clifford Fish-
17 man, an Assistant District Attorney?

18 A Yes, I did.

19 Q And did he give you certain instructions on that date
20 relative to monitoring the wiretap at Diane's Bar?

21 A Yes. He specifically stated to me and the other
22 detectives that he wanted to impress upon us that this was a
23 public telephone, that the officers must be present, that they
24 would monitor the conversations that came over the phone and if
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2 there was any persons who were not specifically mentioned in the
3 wiretap that they would turn it off. And, of course, about
4 privileged communications.

5 Q Now, did he also relate to you what to do in the
6 instance of identifying the voice of Della Valle?

7 A Would you clarify it?

8 Q Did you have any discussion with Mr. Fishman as to
9 identifying the voice of Mr. Della Valle over this telephone?
10

11 A We had difficulty in the beginning, as I say, identi-
12 fying him because over the phone they were talking in grunts
13 and groans and there were guarded conversations and it was very
14 difficult to understand the conversations that were coming out
15 over the phone.

16 Q Now, the instructions which you received from Mr.
17 Fishman and also based on your own experience in the past, did
18 you speak with your men prior to the monitoring, to pass on
19 these instructions?

20 A Yes. The same instructions I received from Mr.
21 Fishman I had passed on to my men. Many of the men said they
22 understood because we had just previously concluded a wire over
23 a public telephone and it was routine.

24 Q Did you in fact initially have a problem in identi-
25 fying the voice of Della Valle?

A Yes, we did.

1 MR. SLOTNICK: Objection, Your Honor.

2 THE COURT: On what ground?

3 MR. SLOTNICK: The first question is as to his own
4 knowledge, did he understand the question as did you. It seems
5 like an all encompassing you.

6 The second point, it calls for a conclusion. I would
7 rather have the facts indicate exactly what went on during that
8 period of time and what period of time it was.

9 THE COURT: We can get both, but I think the first
10 objection is well taken.

11 Q Did the monitoring officers have any difficulty at
12 the beginning?

13 A Yes, they did. I do recall the officers coming to
14 me initially and saying that the first person that they thought
15 was Della Valle was not Della Valle and that they wanted to
16 amend the ex parte order because the name Beans came up some-
17 time during the conversation and they said they were listening
18 to the wrong guy.

19 I said immediately go over to see Fishman and give
20 him all the facts because I feel this ex parte order has to be
21 amended.

22 MR. FEFFER: I have no further questions.
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2 CROSS EXAMINATION

3 BY MR. FEITELL:

4 MR. FEITELL: May we have the original wiretap
5 orders?

6 May we have these two orders marked, Your Honor,
7 the Diane's Bar one order and Diane's Bar two. The first one
8 is dated December 8, 1971, Judge Birns' order. Can we have
9 that marked as Government's Exhibit 1.

10 THE CLERK: That will be Government's Exhibit 5.

11 (Government's Exhibit 5, marked for identification.)

12 THE CLERK: Are you continuing?

13 THE COURT: No. Let's make a separate bundle of
14 exhibits on this minimization problem.

15 (Government's Exhibit 1 is marked for identification
16 and Government's Exhibit 2 is marked for identification.)

17 MR. FEITELL: The one marked 2 is the order dated
18 January 6, 1972, the order of Justice Harold Birns.

19 THE COURT: Those are the first and second Diane's
20 Bar orders respectively?

21 MR. FEITELL: Yes, Your Honor.

22 Q Now, in connection with Government's number 1, for
23 identification, prior to Judge Birns signing this proposed order
24 did you have an opportunity to examine it?

25 A Excuse me, repeat that, please.

1
2 Q Did you examine 1, for identification?

3 (Document handed to witness.)

4 A Yes, sir.

5 Q Where was it that you examined the proposed order?

6 A I believe it was in--I examined it several times
7 prior to Mr. Hogan signing the order. I looked the order over
8 and I consulted in the application with the ADA who prepared it.

9 Q When did you do that, bearing in mind that the order
10 was signed on December 8, 1971?

11 A The day of December 8th when it was completely written
12 up, I believe I perused it in the District Attorney's office,
13 New York County.

14 Q Can you tell us who composed your affidavit?

15 A The District Attorney as a result of questioning me
16 composed the affidavit.

17 Q So in effect he spoke to you and based upon what you
18 told him he dictated this to somebody? Is that right?

19 A I believe so, correct.

20 Q Now, when you told the facts as you knew them to Mr.
21 Fishman, where were you?

22 A In his office.

23 Q And you were there with Mr. Eaton. Is that right?

24 A Det. Eaton and I believe there were one or two others
25 in the room.

Hill-cross

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2 Q After you told him the facts respecting the case
3 did you leave his office?

4 A Yes.

5 Q And you went elsewhere, right?

6 A Right.

7 Q And Mr. Eaton went elsewhere, too. Is that right?

8 A I don't remember specifically.

9 Q When you were in the office with Det. Eaton and
10 Mr. Fishman, you three were the only people there discussing
11 the preparation of the papers. Is that right?

12 A I don't believe so. I believe there were other
13 officers present.

14 Q Who else was there?

15 A I don't recall. I believe one of my sergeants was
16 there, Det. MacDonald presently in the 3rd Homicide or Robbery
17 Squad.

18 Q And was Mr. Fishman taking any notes down when that
19 was happening?

20 A Yes.

21 Q He was writing things out in his own handwriting,
22 right?

23 A He was writing it out over a period of time. This was
24 not the only time he wrote notes. It had been over several or
25 maybe two or three weeks.

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Hill-cross

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2 Q But with respect to this meeting on December 8th at
3 his office with Fishman and other officers, this affidavit
4 hadn't been prepared prior to that date, right?

5 A I don't know if it was concluded on that date or if
6 it was prepared, I don't remember.

7 Q And that's everybody that was in that room, is that
8 right?

9 A As I best recall.

10 Q Then you left the room and went on to conduct your
11 other business?

12 A Right.

13 Q So it's a fair statement to say you weren't actually
14 sitting there when Mr. Fishman dictated this to a stenographer,
15 right?

16 A I don't recall him sitting there dictating to a
17 stenographer.

18 Q But you did see him taking down notes. Is that
19 correct?

20 A That's correct.

21 Q Now, prior to that date how many times had you been
22 in to see Mr. Fishman respecting your concern about Joseph Della
23 Valle?

24 A I don't know. Numerous times, I assume.

25 Q When for the first time did you discuss Joseph

1
2 Della Valle with Mr. Fishman?

3 A I don't recall, sir. My function was as an adminis-
4 trator. I was the commanding officer. The specifics were left
5 to the detective assigned to the investigation.

6 Q Didn't you just tell us you were there to see him
7 from time to time in connection with this case prior to December
8 8, 1971?

9 A I believe I was requested to come in to see him be-
10 cause he wanted me to corroborate the meet.

11 Q That's the limitation of your knowledge regarding
12 this case, the so called meet, right?

13 A My function of the administration of the ex parte
14 order.

15 Q When you talk about a meet, tell us what you mean
16 by a meet.

17 A We were meeting with a confidential informer.

18 Q Is this the confidential informant that you referred
19 to in your affidavit annexed to the order of December 8th where
20 you met this fellow out on some exit near Great Neck? Is that
21 right?

22 A On the Long Island Expressway. I believe the exit
23 was Lakeville Road.

24 Q That's for Great Neck, isn't it?

25 A I don't know, sir.

1
2 Q And you had a discussion with the alleged informant
3 at that time?

4 A That's correct.

5 Q And what did he tell you?

6 MR. FEFFER: Objection, Your Honor. This has nothing
7 to do with the minimization hearing going on. It has to do with
8 probable cause.

9 THE COURT: Sustained.

10 Q Now, you said that you had participated in ten other
11 cases prior to your involvement in this case. Is that right?

12 A No, thousands of cases.

13 Q In connection with wiretapping.

14 A Approximately ten, yes, sir.

15 Q But you were a line officer in connection with those
16 cases as it were or were you the officer in charge of all ten
17 cases?

18 A Officer in charge.

19 Q Did you actually sit in and do the listening?

20 A When there was pertinent conversations to listen to,
21 I came down and listened.

22 Q When you heard something was brewing you made it your
23 business to get down there?

24 A Yes, sir.

25 Q How much of that type of listening did you do in this

Hill-cross

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2 case?

3 A I would say during the course of the ex parte order
4 I went to the plant, if you want me to explain the plant--

5 Q I want you to just answer the questions. How many
6 times did you do listening in connection with these two wires?

7 A Two or three times a week.

8 Q And when you came down to the plant--incidentally,
9 where was the plant?

10 A The plant was located in a school up in Harlem, 25th
11 Precinct. I believe it was 105th Street.

12 Q Near Diane's Bar?

13 A In the general vicinity, yes, sir.

14 Q And when you came up to listen to taps, that was
15 two or three times a week. Is that your testimony?

16 A That's correct. I got daily notes on the taps. I
17 read them.

18 Q When you would come up to listen would you actually
19 stay there and endorse your name in the logs?

20 A No, sir.

21 Q Didn't you tell us before that part of the instruc-
22 tions you gave to people was that when you come in and you're
23 doing listening you put your name on the log, you sign in?

24 A Monitoring officers, sir. Not the commanding officer.

25 Q Then you weren't monitoring? Right?

Hill-cross

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A No, sir.

Q So you were just there but weren't monitoring, right?

A I listened.

Q You perceive a difference between monitoring and listening?

THE COURT: Mr. Feittel, you know there is only me here and I need all the help I can get. Don't help me with that kind of refinement. Let's get to the issues on this hearing.

Q Now, could you tell us the names--withdrawn.

You said you gave instructions prior to the implementation of the tap to your team of subordinates. Is that correct?

A That's correct.

Q Who was on that team?

A First line supervisor was Sgt. MacDonald, Det. John Eaton, Det. Cortazzo, Det. Navoa, and Det.--may I refresh my memory?

Q You have some notes you made in connection with this case?

A No, I don't. I made these upstairs. Det. Eaton, Det. Cortazzo, Det. Mallard and Det. Navoa.

Q Did you mention a Richards?

A I don't recall.

Hill-cross

1 Q You mentioned the name of somebody before Eaton. Who
2 was that, do you remember?
3

4 A I don't recall.

5 Q And these instructions, where did you give these
6 instructions?

7 A Either in my office prior to the tap or I gave them
8 over the telephone. I don't recall specifically where.

9 Q So you might have given the instructions more than
10 once. Is that right?

11 A Yes, sir.

12 Q Did you have a card that you read them off?

13 A No, sir.

14 Q You did it from the top of your head, right?

15 A That's correct.

16 Q Now, prior to this particular case had you worked with
17 Clifford Fishman before?

18 A No, sir, I have not. Never worked with Fishman.

19 Q So you prior to that, your involvement in this case
20 never had the benefit of his scholarship and learning in connec-
21 tion with wiretapping. Is that right?

22 MR. FEFFER: Objection, Your Honor.

23 THE COURT: Sustained.

24 Q Now, the instructions that you gave, where did you
25 get those instructions from?

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Hill-cross

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2 A Specifically, I received them on December 8th from
3 Clifford Fishman, A.D.A. Clifford Fishman. Prior to that I had
4 received it from other District Attorneys, plus from my own home
5 studies, etc.

6 Q And what did your own home studies include?

7 A The criminal--formerly the Code of Criminal Procedure
8 and then the Criminal Procedure Law of Maintaining Ex Parte
9 Privileged Communications. I'm not an attorney, sir.

10 Q So with respect to your knowledge regarding the
11 operation and implementation of taps, that was based on con-
12 versations you had with Assistant District Attorneys from time
13 to time?

14 A That's correct.

15 Q And what you garnered yourself through your own home
16 studies, right?

17 A That's correct.

18 Q You never had a course of training as such regarding
19 electronic surveillance?

20 A No, sir. I did have instructions at the C.I.C. school.
21 That was when I first became a detective where I was instructed
22 on maintaining wiretaps, ex parte orders.

23 Q That was under the old wiretap law. Is that right?

24 A That was under the Criminal Code of Procedure.

25 Q How long ago was that?

Hill-cross

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2 A Around ten, twelve years ago.

3 Q And part of that course dealt with the mechanics
4 of setting up the tap?

5 A That's correct.

6 Q And the machinery aspects of it?

7 A That's right.

8 Q And how to run a plant, right?

9 A That's correct.

10 Q Now, prior to the commencement of this tap, had you
11 ever heard the voice of Joseph Della Valle?

12 A No, sir.

13 Q But there was one officer who had worked or was
14 working with you of all the officers that you did name who
15 did know Joseph Della Valle's voice?

16 MR. FEFFER: Objection. Is that a question or a
17 speech?

18 THE COURT: I take it it's a question. Is that a
19 question?

20 MR. FEITTEL: Certainly, Judge.

21 A Would you repeat the question?

22 (Whereupon, the pending question was read back by
23 the reporter.)

24 A Det. John Eaton had overheard a conversation.

25 Q How do you know about that?

Hill-cross

A Det. Eaton told me and it was corroborated by a confidential informant, who also said that.

Q That's the informant who actually was speaking to Della Valle?

MR. FEFFER: Objection again, Your Honor.

MR. FEITTEL: This plays right into what we are dealing with now.

THE COURT: I don't understand that.

MR. FEFFER: Det. Eaton will be a witness here and I don't see how this line of questioning with this officer is going to get any further with respect to voice identification.

MR. FEITTEL: We have testimony here to the effect about certain alleged difficulties regarding the identification of the voice of Joseph Della Valle. From yesterday's arguments you know how this plays into this case, Judge, so you must know where I'm going. If you don't, I'll spell it out at the side bar.

THE COURT: What's the ground of your objection?

MR. FEFFER: The ground of the objection is that this officer has testified that John Eaton was the individual who overheard the voice of the informant and that he has not-- that he never heard the voice of Della Valle.

THE COURT: And the pending question which I have now forgotten is what?

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Hill-cross

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2 MR. FEITTEL: With respect to the identify of the
3 voice of Joseph Della Valle, who had heard that voice apart
4 from himself? It now turns out it's Eaton. Then he tells me
5 that he confirms that through his conversation with an informant.
6 Then I asked him was that the informant that you spoke to out
7 on Lakeville Road.

8 THE COURT: Objection sustained.

9 Q Well, when you spoke to Eaton he told you about a
10 conversation that he had with Joseph Della Valle. Is that
11 right?

12 A Not that he had had.

13 Q That he had overheard?

14 A That's correct.

15 Q And did he tell you when that conversation had
16 taken place?

17 A Yes. The specific date I don't recall. It was prior
18 to the ex parte order.

19 Q Well, you have read the ex parte order, haven't you,
20 and the underlying papers, right?

21 THE COURT: I don't really care whether he has or
22 not.

23 MR. FEITTEL: I want to refresh his recollection,
24 Judge.

25 THE COURT: Show him something then.

Hill-cross.

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2 Q Would that have been sometime at the end of October,
3 1971?

4 A It was prior--it could have been.

5 Q Did Mr. Eaton, Det. Eaton tell you where he was when
6 he overheard the conversation?

7 A I believe it was in the midtown Manhattan, in the 80's.

8 Q Would it refresh your recollection if I told you that
9 he overheard it take place at Lexington Avenue and 50th Street?

10 A That could be it.

11 Q In what kind of premise did that take place?

12 A I don't recall.

13 Q Did he tell you what the conditions were for the
14 overhearing? Was he listening in on a wire?

15 A He was listening in. There was a conversation, I
16 believe, in a public telephone which--this is what he informed
17 me, that the subject had called a number which he observed him
18 calling and he listened at the receiver.

19 Q Indicating he put his head close to the ear piece?

20 A I don't know the specifics.

21 Q That's what you just did, isn't it?

22 A As far as I recall, I recall that he said he overheard
23 it. I didn't go into how did he overhear it.

24 Q Did he show you some notes he made of that conversa-
25 tion of who had said what to whom?

A I don't recall.

Hill-cross

Q Now, I show you Exhibit 1 for identification and respectfully address your attention to paragraph 14 thereof and I ask you to limit your reading to paragraph 14 which covers--I'm limiting you now to pages 6 and 7 and ask you if that refreshes your recollection as to whether or not Mr. Eaton ever showed you any notes that he had written down depicting the conversation that he allegedly overheard?

A You want me to stay with page 6 only? It's more. It doesn't say anything about notes here.

Q But you're reading the statements made by the parties to that conversation; that is, what the informant said and what Mr. Della Valle said, right? Are you finished with that conversation?

A I'm continuing.

Q I just want the conversation.

A Just the verbal stuff?

Q Yes.

Now, you have digested that verbal material, right?

A Did I digest it? No, I didn't. I perused it.

Q You just read it.

A It's of no interest to me in this particular case what another man had said. I wasn't present, sir.

Q Did he ever show you any notes reflecting that telephone conversation and its content?

1 A I don't recall.

2
3 Q Now, in connection with your discussion with the
4 informant, did what the informant tell you depart in any way
5 from what you just read?

6 MR. PEPPER: Objection, Your Honor. It has nothing
7 to do with the voice identification.

8 THE COURT: Yes, I don't think it has either. Sus-
9 tained.

10 Q That's the conversation that Det. Eaton told you
11 about, right?

12 A He just--in general terms, yes.

13 Q Just in passing told you about it, right?

14 A He told me that he had corroboration and I sent him
15 to the District Attorney to go into it in complete detail with
16 the District Attorney, not with me.

17 Q You made it your business to interview the informant
18 to corroborate it. Is that right?

19 MR. PEPPER: Objection.

20 THE COURT: What does that have to do with it?

21 MR. FEITTEL: We are getting into whether or not
22 Mr. Eaton ever had this conversation with the officer allegedly
23 disclosing that he had a conversation.

24 THE COURT: Did he ever have a conversation with
25 Lt. Hill?

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Hill-cross

1 MR. FEITTEL: Yes.

2 THE COURT: Objection sustained.

3 Q Did Det. Eaton tell you that he had heard Joseph
4 Della Valle's voice at any other time?

5 A I don't recall.

6 Q So it's that one conversation that we're talking
7 about that you just read. Is that right? That's how he heard
8 Joseph Della Valle's voice, right?

9 A As I recall now.

10 Q Before you came to court today did you bother reading
11 over any of the papers in the case?

12 A I read, I believe, it was last week.

13 Q Did you read this affidavit, Eaton's affidavit?

14 A Yes.

15 Q Well, do you remember any other conversation he
16 allegedly overheard between the informant and Joseph Della
17 Valle, such as would have given him some kind of familiarity
18 with Joseph Della Valle's voice?

19 A I don't recall.

20 Q You don't recall that?

21 A No, sir.

22 Q Well, I show you page 15 of the affidavit of Det.
23 Eaton, which is annexed to Government's 1 for identification
24 and ask you to read that. I ask you if this refreshes your
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Hill-cross

recollection that he told you about another conversation that he overheard with Joseph Della Valle? Just read that.

A This refreshes my memory.

Q When you went out to see the informant, did he tell you about that conversation, too?

MR. FEFFER: Objection, Your Honor.

THE COURT: Sustained. Mr. Feittel, that kind of question, don't keep asking it. The person is here.

Q So that now having read this you recall that you had information from Det. Eaton that he told you about two separate conversations that he overheard the voice of Joseph Della Valle, right?

A Correct.

Q From your understanding of the affidavit and what you learned from Det. Eaton, and if you have to refresh your recollection, would it refresh your recollection that the conversations took place within three or four days of each other, that's on October 29, 1971 and November 2, 1971.

(Document handed to witness.)

A One took place October 29, 1971. The next one was Tuesday, November 2, 1971.

Q Just a few days later, within the week, right?

A Right.

Q And now you recall that Det. Eaton discussed those

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2 conversations with you and told you that he had heard that
3 subject's voice twice within one week, right?

4 A He told me that he had pertinent conversations which
5 he had overheard. To go into specifics I said to contact the
6 District Attorney and work with him closely.

7 Q And based upon what the officer, Det. Eaton, had
8 learned, a program was embarked upon to generate this order
9 against Joseph Della Valle. Is that right?

10 A That's correct.

11 Q Now, at the time this discussion came up respecting
12 getting an order against Joseph Della Valle, was there any
13 discussion about the names of other persons, such as Stephen
14 Dellacava, who would be wiretapped at the same time in connec-
15 tion with this order?

16 A No, sir.

17 Q His name never came up, right?

18 A Not initially.

19 Q Only after the tap was put in, right?

20 A That's correct.

21 Q Now, another tap was put in on the home phone of Joseph
22 Della Valle up on Theriot Avenue. Isn't that so?

23 A That's correct.

24 Q And you knew he resided there from your other
25 intelligence. Isn't that so?

Hill-cross

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2 A I read the reports and from the detective's testimony
3 and what they told me I assume he lived there.

4 Q So that there was material in the reports of the
5 Police Department indicating that Joseph Della Valle lived on
6 Theriot Avenue, correct?

7 A That's correct.

8 Q And there is even some information to the effect
9 that the name Della Valle appears on the letter box downstairs
10 at the Theriot Avenue address. Isn't that so?

11 A That was in the affidavit, yes.

12 Q So that was checked out, too. Did they know if
13 Joseph Della Valle was married or living at home with his parents
14 or what?

15 MR. PEPPER: Objection to the relevancy of this.

16 MR. FEITTEL: If you give me a little leeway, Judge,
17 I will get to this.

18 THE COURT: That's no answer. Sustained.

19 Q Now, knowing that Joseph Della Valle lived at 1475
20 Theriot Avenue, did you instruct your officers, in view of
21 your long experience, about initial difficulties identifying
22 voices, to wire in on the Theriot Avenue address to pinpoint
23 Joseph Della Valle's voice; did you instruct them to do that
24 first?

25 A I don't recall, sir.

Hill-cross

Q But you don't recall that you did do that, do you?

A No, I don't.

Q Did you say to Det. Eaton, in words or substance, Det. Eaton, you say you heard this fellow on the phone twice. want you to listen at Theiriot Avenue and point out the voice to the other agents.

A I told Det. Eaton I wanted him to listen to all the tapes, at Theiriot Avenue and at the bar.

Q Did Det. Eaton come to you at the threshold of this thing and say to you in words or substance, I'm not familiar with Joseph Della Valle's voice. Did he say that to you?

A Not in substance.

Q He said he had heard the voice twice, right, yes or no?

A I can't answer yes or no, sir.

Q Now, getting back to the order, Exhibit 1 for identification. Were you presen when the tap was installed?

A Actually installed?

Q Yes.

A No, sir.

Q What about the Theiriot Avenue address, were you present when that was installed?

A No, sir, I wasn't.

Q Were you present at any time when these plants went

Hill-cross

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2 into operation at the beginning?

3 A I made inspections of them initially when they were
4 in.

5 Q After they had been launched. Is that right?

6 A After they were physically put in.

7 Q So you didn't hear the first and initial conversations
8 in either plant, is that so, the kick-off conversations?

9 A I don't recall. Unless they were pertinent.

10 Q Did you get up there the first day the plant went
11 into operation in that school?

12 A I don't remember.

13 Q If you had, would you have noted it on the logs that
14 you had dropped in?

15 A No, sir.

16 Q Well, wouldn't your brother officers or your subordi-
17 nates have indicated that in the logs?

18 A Sir, I was a second line supervisor, not a first line
19 supervisor.

20 Q So there was no regular procedure for your name to be
21 listed anywhere in these logs, right?

22 A No, sir.

23 Q So your log name didn't appear anywhere in the logs?
24 Is that right?

25 A I don't know. I don't recall.

Hill-cross

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2 Q You haven't looked at the logs, right?

3 A No, sir, I haven't. Not since they were initially
4 made.

5 Q Now, in discussing the instructions that you gave to
6 your subordinates, what instructions did you give them with
7 respect to listening in on conversations of individuals whose
8 voices--neither of whose voices was the voice of Joseph
9 Della Valle?

10 A Well, initially when they were listening I told them
11 that if you positively know that the person your listening to
12 is not the person specifically mentioned in the ex parte order,
13 you're to turn off the machine.

14 Q Do you know if that instruction you gave to your
15 subordinates was followed?

16 A I know it was followed.

17 Q You do know it was followed?

18 A That's right.

19 Q Are you familiar with a call that was made at about
20 1552 hours on the first day of the plant, which would be December
21 what?

22 A The ex parte order went into effect December 8th. I
23 believe the wire was put in either that day or immediately the
24 next day.

25 Q Well, did you hear--incidentally, did you listen to the

Hill-cross

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2 taps of that day?

3 A I don't recall.

4 Q Did you ever listen to the tapes of that day?

5 A If they had pertinent conversations in it, I did.

6 Q Well, did you ever find out that a telephone conversa-
7 tion had taken place at 1552 hours that day between a Charlie
8 and--withdrawn.

9 Between a Sam and a Dennis at 1545 hours.

10 A Counselor, my responsibility was not monitoring the
11 tapes. There was the individual detective's responsibility.
12 Mine was purely administration.

13 Q Did you find out that that conversation at 1545 hours,
14 let the record be corrected, at 1545 hours was between a Sam
15 and a Dennis and that it had been transcribed?

16 A A^Gain, Counsel, you have to--

17 THE COURT: Why don't you just answer yes or no.
18 Did you find out or didn't you?

19 THE WITNESS: I don't know.

20 THE COURT: The answer is you don't know. Please
21 shorten your answers.

22 Q Have you ever seen the transcripts in the case?

23 A Yes, I have.

24 MR. FEITTEL: May I have this marked for identifica-
25 tion?

Hill-cross

(Defendant's Exhibit A, marked for identification.)

MR. SLOTNICK: May I make a suggestion for orderly procedure, since apparently what we're doing is putting in orders and logs, could they all run down similar numbers so we can relate, instead of fishing for the Della Valle logs which are Exhibit 1, looking for Exhibit A. It would be more orderly if we just ran the logs or we came up with a formula for inserting logs in the record.

THE COURT: What is the formula?

MR. SLOTNICK: Could they all bear the same Arabic number and perhaps A, B, C, after that?

THE COURT: Is that agreeable with everybody?

MR. FEFFER: No objection to that.

THE COURT: What do you want to call this one, 1A?

MR. SLOTNICK: I would presume 1A.

THE COURT: Did this relate to the order, the first Diane's Bar order?

MR. FEITTEL: All right. That makes sense. Call it 1A.

(Defendant's Exhibit 1A is marked for identification.)

Q Would you take a look at 1A for identification and limit yourself to pages 1 and part of page 2 and tell us whether, after briefly scanning this, this refreshes your recollection that you read a transcript of a call on December 9th between

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Hill-cross

1 Sam and Dennis.

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3 As soon as you perceive what you're reading that you
4 have read that before, would you please stop and tell me that it
5 refreshes your recollection that you have seen this before.

6 A I remember Clark's Bar. Specifically what and how it
7 had to do with it, I don't recall.

8 Q Do you know if this conversation which was recorded
9 in its entirety has anything to do with this case?

10 A I don't know, sir.

11 Q Well, as the person second in charge, didn't you make
12 it your business to determine what the officers were trans-
13 cribing?

14 A The officers told me that they had difficulty deter-
15 mining who and what was being said over the telephone. I said
16 listen until you can make sure who you're identifying.

17 Q When you heard that with respect to the Sam and Dennis
18 call, did you say in words or substance, gee, let me hear it.
19 I want to see if it's so bad that you couldn't have turned it
20 off?

21 A I didn't say that, sir.

22 Q Well, did you ever ask to hear the calls between Sam
23 and Dennis on December 9th?

24 A I don't recall.

25 MR. FEITTEL: Do we have a clean copy of the logs,

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the original logs?

MR. FEFFER: The log or the transcript?

MR. FEITTEL: Well, this is the log.

MR. FEFFER: These are the logs, Your Honor, for both orders, covering both months, December, January and the early part of February. These are the originals.

THE COURT: You may violate Mr. Slotnick's administrative regulation, which is a sensible one. Can you separate them?

MR. FEFFER: I will try.

MR. SLOTNICK: I'll waive my rule if it causes difficulty.

THE COURT: Mark it anyway you like as long as you know what it is.

MR. SLOTNICK: I think they can separate them, because in my logs we have a differentiation.

MR. FEFFER: I think we can. This would be 1B, Your Honor.

xxx

(Defendant's Exhibit 1B, marked for identification.)

MR. SLOTNICK: Your Honor, is 1B the entire log?

MR. FEFFER: No.

MR. SLOTNICK: It's separated then.

MR. FEFFER: Counsel, 1B for identification is the log for Diane's Bar 1 and 2? No, just the first order. Just

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2 covering the first order.

3 MR. FEITTEL: Could we change the designation 1A and
4 move it over from the copy I was working with to the original,
5 1A being the transcript of the first Diane's Bar order?

6 MR. FEFFER: I don't believe we have the original
7 transcripts. I do have a carbon copy which was marked up and
8 that's a duplicate of the carbon copy.

9 THE COURT: What is the problem? Are you having
10 trouble reading the copy?

11 MR. FEITTEL: The copies I'm working with were marked
12 up and they shouldn't be shown to the witness. Is there no
13 unmarked copy in the courtroom?

14 MR. FEFFER: Ours are marked up too, Your Honor, the
15 copies I have.

16 THE COURT: And the copy that Mr. Feittel has you
17 supplied him with?

18 MR. FEFFER: Yes, Your Honor.

19 THE COURT: If you want to put a clean one in evidence,
20 make a clean one, Mr. Feitel.

21 MR. FEITTEL: We will do that, Judge, if we get the
22 original from the U.S. Attorney's office;

23 MR. FEFFER: I don't have the original.

24 THE COURT: Where is the original?

25 MR. FEFFER: I have no idea. Of the transcripts we

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Hill-cross

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2 have the original orders, logs and afterwards, but not the
3 original transcripts.

4 THE COURT: I count on members of our bar to work
5 their way through a juris prudential difficulty of this kind
6 and organizing the means for creating a clean version of this
7 thing and putting it in evidence if we need it.

8 Let's proceed.

9 Q Now, in connection with Exhibit 1B for identifica-
10 tion, page 1 thereof, would you please look at the call under
11 the time designation 1545, between Sam and Dennis, bearing an
12 asterisk next to it.

13 Now, does that refresh your recollection that you
14 listened in on the recording of the Sam and Dennis call?

15 A No.

16 Q In connection with that call did either of the offi-
17 cers at the plant tell you they were confused as to whether the
18 voices they heard on that tape were the voices of Joseph Della
19 Valle?

20 A Do I specifically remember them telling me that?

21 Q Yes.

22 A No, sir.

23 Q Do you have any recollections that with respect to
24 that call the officers at the plant told you that they were
25 having difficulty identifying voices?

Hill-cross

1 A Are you saying do I specifically remember anything?

2 Q I didn't say specifically this time. I said that on
3 the other question. Do you have any recollection? I'll take
4 any recollections.
5

6 A I have a recollection of the men telling me that they
7 feel that these people are speaking on the phone are using codes.

8 Q Now, with respect to this call taken at 1545, under
9 the designation Sam and Dennis, did they tell you that code talk
10 was being utilized in that call?

11 A I don't recall.

12 Q Did they tell you that the call was muddy or in any
13 way inaudible?

14 A I don't recall.

15 Q Did you see the logs or did you see this log before
16 with the asterisk next to it?

17 A I've seen hundreds of logs. I can't recall if I seen
18 this one or not.

19 Q You were second in command in this investigation, right
20 THE COURT: Don't keep repeating, Mr. Feittel. Let's
21 move on.

22 Q Now, with respect to the first page of the logs, on
23 the kick-off day of the investigation, is there any other call
24 on page 1 which bears an asterisk except the call between Sam
25 and Dennis?

Hill-cross

A There is none with an asterisk.

THE COURT: He has answered the question.

MR. FEITTEL: Read that back, please.

(Whereupon, the pending question was read back by the reporter.)

Q You don't see this asterisk and this is the only one, Sam and Dennis?

A Counsel, I don't have my glasses. Let me look. I don't see any.

Q You do see one?

A At 1545, incoming, Sam and Dennis.

Q Sam and Dennis, thank you.

Was your curiosity ever peaked to listen to what that call had to do with?

A I may have read the minutes, sir.

Q But you're not sure that you ever read the minutes, right--the transcript you mean?

A I'm almost positive I read all the minutes.

Q So you read the transcript before that you just read here, which is 1A of this Sam and Dennis call, right?

A I believe I did.

Q When did you read it?

A Either the next day or the day after.

Q And did you discuss with your brother officers what,

Hill-cross

under God's heaven, this has to do with this narcotics investigation, did you?

A No, I don't believe so.

Q Did you ever say to them that this is clearly a call you should have turned off, it didn't involve Joseph Della Valle?

A We don't know if it did. Maybe he was Dennis or the other fellow.

Q Now, had you ever heard that Joseph Della Valle used an alias, Dennis?

A I don't recall.

Q Well, had you ever heard that he had used an alias, Sam?

A I don't recall.

Q Who was sitting in on the tap that day?

A You will have to see the minutes to see who signed it.

Q In other words, you can't recall, right?

A Can't recall.

Q I show you 1B for identification, the log for the first day. Tell us who was sitting in on the plant that day in the first name position?

A Det. Eaton and Mallard, it says, 12/9.

Q Eaton's name is written first. Is that right?

A That's right.

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2 Q Whose handwriting is that?

3 A Either Eaton or Mallard's.

4 Q Did you ask Det. Eaton whether in listening to the
5 Sam and Dennis call he was confused as to whether the voice was
6 that of Joseph Della Valle?

7 A I recall a conversation with Eaton. He said he couldn't
8 be sure whose voice--at the beginning he wasn't sure of whose
9 voice was whose.

10 Q Did you remind him that he had twice before listened
11 to Joseph Della Valle's voice?

12 A No, sir.

13 Q So he was confused from the very start. Is that your
14 testimony, as to Della Valle's voice?

15 A No. My testimony is all the men were not sure of who
16 was who speaking on the telephone.

17 Q Well, was it part of your instructions that if you're
18 not sure whose talking on the telephone, that you can keep
19 listening until you're sure?

20 A When you're not sure, if you believe that it is the
21 subject of the wiretap, then you can listen. Once you believe
22 it is not the subject of the wiretap, turn it off.

23 Q Did you find out from Det. Eaton why he thought one
24 of the people talking on that call was Joseph Della Valle?

25 A No.

41
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Hill-cross

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2 Q He never told you, did he?

3 A No, sir.

4 Q Do you know now that it wasn't Joseph Della Valle
5 on that call?

6 A No, I don't.

7 Q You don't?

8 A No.

9 Q Did you ever hear Joseph Della Valle's voice?

10 A I don't recall, sir.

11 Q You don't recall? Do you remember that a plant was
12 established near Theiriot Avenue on December 9th, do you
13 remember that, yes or no?

14 A Yes, I do.

15 Q Who were you supposed to be tapping in connection
16 with that plant?

17 A I've read the notes, sir.

18 Q Could you tell me?

19 A Della Valle.

20 Q At his home, right?

21 A That's correct.

22 Q Now, do you remember whether you ever heard Della
23 Valle's voice?

24 A I probably did when I monitored taps.

25 Q And when for the first time did you hear Joseph Della

Hill-cross

Valle's voice on the Theirot Avenue tape?

A I don't recall.

Q Did his voice come up on the first day of the tape?

A I don't recall.

Q Have you looked at the logs?

A No, sir.

Q So it's your testimony that if one of your subordinates was in anyways unsure as to who was talking on the phone, he had carte blanche liberty to listen to the entire call, right?

A That's not my testimony.

Q Well, what is your testimony in respect to that?

A Well, my testimony is that if he believed the subject could be the person, he was to listen until he was positive that it either was or wasn't. If it wasn't, one of the subjects mentioned in the ex parte order he was to turn it off.

Q When these taps were implanted and operated the usual practice was to have the officers there together. Is that correct?

A Either in my office or before I--I instruct them in my office or either on the telephone.

Q With respect to the first day at the school plant up near Diane's Bar, you refreshed your recollection that Eaton and Mallard were there, right?

Hill-cross

1 A According to the notes.

2 Q You assigned them to be there?

3 A I assigned them or the agent assigned them.

4 Q They were brother officers on duty together at the
5 plant. Is that right?

6 A That's correct.

7 Q And as the telephone call that we're talking about,
8 Sam and Dennis, was being recorded, in the ordinary course of
9 events they would have an opportunity to discuss the identity
10 of the voices they were recording, right?

11 A You will have to ask them.

12 Q Well, did Det. Eaton ever tell you that he had trouble
13 fathoming the voices on that call?

14 A I believe that he--not that specific call.

15 Q That call.

16 A I don't recall.

17 Q Now, with respect to how the plant operates, do these
18 officers sit there with phones or is there a loudspeaker?

19 A What do you mean, with phones? There is a tape recorder
20 similar to the one that is sitting here. You can monitor it
21 while it's recording the conversation, you can listen with your
22 ear.

23 Q Is this the Tandberg that was used?

24 A I don't know, sir.
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Hill-cross

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2 Q Do you know where the machine that was used on that
3 day is?

4 A I believe it's with the C.I.B.

5 Q Is it a Tandberg?

6 A Tandberg.

7 Q What model is this?

8 A Yes.

9 Q Are you familiar with any particular model?

10 A I don't know, sir.

11 Q Are you familiar with the Tandberg models?

12 A I don't know, sir.

13 Q All the Tandberg models, do the same thing?

14 A All you could do is listen to the conversations as
15 it was being recorded.

16 Q Was it your regular practice to hand out earphones
17 or did you allow your officers to carry out audition without
18 the assistance of earphones?

19 A I believe there is a spot there that you can--

20 Q That isn't my question. I'm not asking you if there's
21 a place where you can plug in a phone. What was the practice
22 on that first day?

23 A The practice, as I recall, is that you listen.

24 Q The two men sit there and listen together, right?

25 A That's the normal practice.

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Hill-cross

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2 Q Because they are supposed to help each other, isn't
3 that so?

4 A To help each other?

5 Q They are partners in connection with the investiga-
6 tion. Isn't that so?

7 A You have to interpret what you listen.

8 Q And they discussed this with each other as the call
9 develops. Isn't that so?

10 A That would be normal practice.

11 Q That's part of the reason for having more than one
12 person there so that the job could be done by two?

13 A We didn't always have two persons. We had logistic
14 problems.

15 Q In connection with these taps, these logs, they indi-
16 cate, do they not, that the practice was to have two men in a
17 plant, right?

18 A You will have to let me review the logs.

19 Q There is no question in your mind there were two men
20 assigned to that plant on that day. Isn't that so?

21 A On that particular day they were both signed in.

22 Q So if they were both in the room together listening
23 to the call as it developed they would have both heard it at the
24 same time if they were listening, right?

25 A You will have to ask them. They were there.

Hill-cross

1 Q Well, in giving your officers instructions when they
2 are working at a plant, do you tell them if they're both in the
3 room they should both listen?
4

5 A There's many duties to do.

6 Q Did you understand the question?

7 A No, I didn't give them the instructions that they were
8 both to listen.

9 Q What's one of the other duties that an officer who is
10 not listening who is in the room is supposed to perform?

11 A Maintain the minutes of the notes, type the notes
12 up.

13 Q He's typing while the other fellow is listening?

14 A That could be.

15 Q On a typewriter in the same room?

16 A Normally, sir, when a call comes in he stops typing.

17 Q Isn't the usual practice that they both listen to the
18 call and discuss it as it develops with regard to the issue of
19 relevance?

20 A I would say 98% of the times that is the normal prac-
21 tice.

22 Q And then one or the other or both takes notes as the
23 call spins itself out, right?

24 A That's correct.

25 MR. FEITTEL: May we have the Theiriot Avenue log?

Hill-cross

1 THE WITNESS: Your Honor, is there anyway I can get
2 some water?

3 THE COURT: Yes.

4 MR. FEFFER: I don't believe we have the original
5 Theiriote Avenue logs here. We have the logs pertaining to
6 Diane's Bar. We have copies of the third log which have been
7 provided to counsel.

8 Q Just so that we can save time--withdrawn.

9 We will proceed a little bit with this and then I will
10 make a decision.

11 Could you tell us when for the first time Stephen
12 Dellacava became a person of interest to the Police in connec-
13 tion with the phone at Diane's Bar?

14 A I believe it was sometime after the ex parte was in,
15 one of the officers--there was a conversation. Specifically
16 what conversation--

17 Q That's what I'm asking for, the day and the conversa-
18 tion that he materialized as a subject party.

19 A I don't recall the specific day.

20 Q You don't remember the day or the time or the call?

21 A No, sir.

22 Q You can't tell us anything about that?

23 A I do recall Det. Eaton calling me that he believes that
24 the person they originally were on, there is another person
25

Hill-cross

involved that we were listening to the wrong person; that somebody called out the name, "Beans" and asked a question that was overheard on the wire. I said contact D.A. Fishman immediately and bring him up to date. I think you will have to amend your ex parte order.

Q That was December 19th?

A If you say so, sir.

Q What is it? Or was it December 23rd?

Let's take a look at Government's Exhibit 2 for identification, starting at page 4. Read this affidavit of Det. Eaton, paragraph A, and tell us whether that is the call that alerted you to the participation--

A I have to read it first before I answer.

Q You hear the question first and then you read it.

Tell us after you have read it, that what you have read refreshes your recollection that that was the call on December 19th, as the transcript indicates, that the Police Department first became interested in a criminal investigatory way in Stephen Dellacava in connection with narcotics.

A Is this the conversation here? You just want me to read B, sir?

Q Yes.

A I'll have to read the whole thing in context to fully be able to answer your question.

Hill-cross

Q When was the last time you read this affidavit?

A About two years ago.

Q Weren't you in here to discuss this case before your testimony?

A I thought I was just going to talk about minimization, sir.

Q So nothing you read just now refreshes your recollection as to when they first became interested in Stephen Dellacava?

A No. I'll have to read the whole thing.

Q Getting back now to where you toldus Det. Eaton gave you a buzz on the telephone and told you something about a conversation, what did he tell you that he overheard that was of such importance?

A Generally, I can only tell you generally from my recollection of two years ago. He said they were listening to a conversation of the person that they thought was the person and that he overheard somebody yell back "Hi, Beans." He feels they were listening to the wrong person. That we have to amend the ex parte order to include another person.

Q In other words, he told you that the gentleman they were listening to was the wrong person they were listening to on that call, right?

A Initially.

Hill-cross

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2 Q And that during the course of the conversation that
3 person who was on the phone turned to the side in the bar and
4 addressed himself, in words or substance, "hi, Beans." You just
5 read that portion in the affidavit.

6 A I don't believe it said that in the affidavit that
7 you gaveme. Number 8, did it say Beans?

8 Q Paragraph 9. I gave you the wrong paragraph and I
9 apologize.

10 THE WITNESS: Your Honor, may I ask someone to get
11 my glasses upstairs out of my desk?

12 THE COURT: All right, we will take a recess.

13 (Recess taken.)

14 (The last question was read back by the reporter.)

15 Q Read paragraph 9 and tell us whether that was the
16 conversation you were referring to where it was discovered that
17 you were listening to the wrong fellow and the person who was
18 off the phone and referred to in that call as Beans was the person
19 you should have been listening to, will you read that.

20 (Witness complies.)

21 Q Now, having read it does that refresh your recollec-
22 tion as to whether that was the first time that the investiga-
23 tion focused in on Stephen Dellacava in a criminal way?

24 A Yes, sir.

25 Q And you had this conversation with Det. Eaton who told

Hill-cross

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2 you that they had been listening to the wrong person; the man
3 they have been listening to was Beans, right?

4 A He said he believes that the person they were listening
5 to was the wrong person; that he was involved in it but Beansie
6 was another person.

7 THE COURT: When is this? What date?

8 MR. FEITTEL: December 19th.

9 THE WITNESS: About 2:59 p.m.

10 Is that the time?

11 Q 2:59 p.m, paragraph 9 of page 5 of the renewal order
12 dated January 6th. More correctly, the extension and amendment
13 order.

14 Det. Eaton told you what about the man who was con-
15 ducting the call from the inside of Diane's Bar?

16 A I can only tell you in general terms what I recollect.
17 I recollect him telling me that at the beginning he thought
18 Steve and Beans was one person, but he had just learned that
19 Steve and Beans were two separate and distinct people. I told
20 him you had better notify Fishman immediately because it sounds
21 like they are both involved in the drug trade.

22 Q Who did he think Steve was, did he tell you that?
23 He told you Steve, they were interested in Steve?

24 A I don't recall who he said he was at that time.

25 Q Did he say Steve and Beans were two different people?

Hill-cross

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2 A He said at first he thought Steve and Beans was one
3 person. He is now of the opinion that Steve and Beans are two
4 separate individuals.

5 Q Two separate people?

6 A And both of them were involved.

7 Q Did he tell you how he had first heard about a Steve
8 or Beans before December 19th?

9 A I don't recall, sir.

10 Q Well, to your knowledge was this a wiretap order to
11 intercept calls of anybody by the name of Steve or Beans or
12 Dellacava?

13 A Della Valle, the order was for, Joseph Della Valle.

14 Q It was an order on Joseph Della Valle, right?

15 A Or any of his co-conspirators.

16 Q You looked at the caption of the order?

17 A I believe it said and co-conspirators, I'm not sure.

18 Q If you take a look at the caption of the order, would
19 you please refresh your recollection--you know what the caption
20 is, don't you?

21 A Yes.

22 Q Take a look at page 1 of the original order and tell
23 us whether that refreshes your recollection whether that order
24 mentions anything about the co-conspirators, confederates or
25 accomplices of Joseph Della Valle. Does it say anything in there

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2 about it?

3 A "With co-conspirators, accomplices."

4 Q Do you see anything in the body of the order which
5 refers to overhearing any telephone conversations between Joseph
6 Della Valle and accomplices or co-conspirators?

7 A I read it in the top. You want me to read the entire
8 order through, sir?

9 Q Yes, if you will, very briefly.

10 MR. PEPPER: Your Honor, the order has been identi-
11 fied. It certainly speaks for itself as to what it says. I
12 don't think it's necessary for the witness to read the entire
13 order.

14 THE COURT: You want to put it in evidence, Mr.
15 Feittel?

16 MR. FEITTEL: I'd like to put it in evidence.

17 (Government's Exhibit 1S, received in evidence.)

18 Q So that was the first day, December 19th, that it came
19 to your knowledge that a person by the name of Steve or Beans
20 was now two different people, right?

21 A That's correct.

22 Q Had you ever heard of Steve or Beans before that day
23 in connection with the case in which it was told to you that
24 Steve or Beans was really one person?

25 A Again, I'm only giving it to you as I best recollect.

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Hill-cross

over a two year period.

Q I understand all of that.

A As I best recollect it was that Beans and Steve we thought was the same person. We thought he was Della Valle.

Q So it's your testimony that Det. Eaton had told you during the course of the investigation that Joseph Della Valle was also known as Steve or Beans, right?

A As I recollect.

Q And this is something that he told to you in fact before Judge Birns signed the order, right?

A I don't recall.

Q Well, when for the first time did you hear from Eaton that Steve and Beans were other names for Joseph Della Valle?

A I don't recall.

Q Well, what other names did you hear for Joseph Della Valle, if any, during the course of the investigation?

A I don't recall.

Q That was it, Steve and Beans?

A I don't recall, sir.

Q Do you have any notes?

A No, sir.

Q Did you take any notes during the course of the investigation?

A No, sir.

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2 Q Well, when you were to meet with these people--with-
3 drawn.

4 Before you had the tap installed you told us about
5 this meeting that you had with Mr. Fishman. Did Mr. Fishman
6 tell you you might have to testify in court someday regarding
7 minimization and other features relating to propriety of wiretap
8 orders?

9 A I never heard the word minimization until last week.

10 Q In fact, you didn't know what it was until last
11 week?

12 A I call it monitoring. The Federal prosecutor calls
13 it minimization.

14 Q Would you tell us what you think monitoring is?

15 A That means that the officer would be physically
16 present listening to each word that is coming over the wire
17 and if he hears that it's a privileged communication he will
18 turn it off. If it's not the person specifically mentioned in
19 the wire, he will turn it off. This is what my interpretation
20 of it is.

21 Q Now, to your knowledge were any conversations prior
22 to December 19th, when you heard this call about Steve, Beane
23 being there in the bar at a distance, were any calls between
24 persons not named in the order overheard?

25 A Yes, I believe there were.

Hill-cross

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2 Q In fact, there are a substantial number of calls
3 from the 9th to the 19th, just to take a bracket in time, that
4 involved third persons, right?

5 A It was a public telephone, sir.

6 Q So when the tap was laid in there in the first place
7 you had reason to know that all manner of people would be using
8 the phone, it being a public appliance, right?

9 A That's correct.

10 Q You had reason to believe that not every person who
11 would pick up the phone would be a person involved, would be
12 Joseph Della Valle, right?

13 A That's right.

14 Q In fact, you understood the probability that Joseph
15 Della Valle would be on the phone would be greater on his home
16 telephone than in connection with the bar telephone, right? Yes
17 or no.

18 A I can't answer yes or no.

19 Q Did you ever think about that before the wiretap orders
20 were commenced?

21 A We felt he was using both phones to conduct illegal
22 operations.

23 Q That was based on hard information, right?

24 A Excuse me, sir?

25 Q That was based on hard information, right?

Hill-cross

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2 A It was based on the information of a confidential
3 informant and the information of George Eaton who overheard
4 the conversations.

5 Q And that he used both phones for criminal activities
6 relating to drugs, right?

7 A That was our opinion, sir.

8 Q Now, did Mr. Fishman give you anything in writing
9 at the time of this meeting, sometime in December, be it the
10 8th or 9th of December, prior to the installation of the taps?

11 A No, sir.

12 Except the ex parte order which was signed by the
13 District Attorney.

14 Q Incidentally, with respect to that order did you go
15 up to see Judge Birns?

16 A Yes, I did.

17 Q Did you have a conversation with him?

18 A Yes, I did.

19 MR. FEFFER: Objection to this line of questioning,
20 Your Honor.

21 THE COURT: Well, I won't rule on the line. That one
22 has been answered. You may go question by question.

23 Q Did he ask you certain questions?

24 MR. FEFFER: Objection, Your Honor.

25 THE COURT: On what ground?

Hill-cross

MR. FEFFER: On the basis that it has nothing to do with the execution of the warrant, the monitoring.

THE COURT: What is the relevance of this, Mr. Feittel?

MR. FEITTEL: I'll put a different question, Judge.

Q Did he tell you anything?

MR. FEFFER: Objection, Your Honor.

MR. FEITTEL: Side bar, please.

(Whereupon, a discussion was held at side bar, out of the hearing of the jury.)

MR. FEITTEL: Under Bynum Tottorella I think it would be highly material whether he received--

THE COURT: If he didn't receive any, what would follow from that?

MR. FEITTEL: That's one of the criteria. It is a madley--

THE COURT: Don't talk poetry to me. I don't know what madley means or not. Answer my question. Suppose the Judge didn't say that as I don't when I sign such an order. What follows?

MR. FEITTEL: That's one in my favor, Judge.

THE COURT: In other words, if the officers make reasonable efforts in all other aspects to minimize it would count in your favor that the judge didn't say minimize?

MR. FEITTEL: If they made reasonable efforts and

Hill-cross

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2 their conduct was otherwise correct, then I would possibly be
3 in a very difficult position.

4 THE COURT: If they didn't make reasonable efforts
5 apart from this you would win? I'm just wondering whether the
6 judge ought to be put on trial in this respect and whether we
7 ought to decide as a matter of fact what the judge said or didn't
8 say.

9 MR. FEITTEL: Maybe the judge told him nothing about
10 minimization or told him he didn't have to minimize.

11 THE COURT: With all deference to the Precedents, I
12 don't think I want to take this. Objection sustained.

13 (In open court.)

14 Q Did any discussion take place in Judge Birns' chambers
15 in which you were present in which the operation of the tap was
16 discussed?

17 MR. FEFFER: Objection, Your Honor.

18 THE COURT: You mean with the Judge?

19 MR. FEITTEL: Yes.

20 THE COURT: Objection sustained. I think if the Judge
21 wants to direct anything to law enforcement officers under this
22 statute, he ought to see that it gets put in his order. I'm
23 not going to sit here and invite debate about off the record
24 conversations by a judicial officer and a police officer. I
25 think we have enough other considerations as to the

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Hill-cross

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2 reasonableness of this project without getting into that kind
3 of swamp. So don't try it in some other way. I have ruled.
4 If it's in error, it's on the record. Let's proceed.

5 Q Now, from time to time during the course of the
6 operation of the order, did you have occasion to go back to
7 Judge Birns yourself or with other persons to report on the
8 work product of your investigation?

9 A I don't recall ever going back.

10 Q Getting back to December 19th--withdraw that.

11 Do you know of your own knowledge whether any other
12 officers connected with the case prior to the renewal order went
13 back to discuss with Judge Birns the development of work product
14 of the first Diane's Bar order?

15 MR. FEFFER: Objection, Your Honor.

16 THE COURT: On what ground?

17 MR. FEFFER: The relevancy as to whether the officers
18 in fact minimized or not.

19 THE COURT: I will allow what they may have reported
20 because they can come and testify about it.

21 If you knew, do you know?

22 THE WITNESS: On the particular day that we heard
23 the conversation it was relative to Beansie. When we learned
24 that Beansie and Steve were two separate people, it was my
25 instructions to Eaton to contact Fishman, the District Attorney

Hill-cross

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2 in the case, and it was my understanding that they amended
3 the ex parte order to include that person.

4 Q So that from what you learned on December 9th they
5 went back to Judge Birns to get an amendment to the order,
6 December 19th?

7 A After hearing the conversation where we--after hearing
8 the conversation when we learned that Steve and Beansie were two
9 separate individuals, I instructed Eaton to go back to Fishman,
10 and Fishman and Eaton went back and amended the ex parte order
11 to include him.

12 Q The Judge amended it?

13 A Yes.

14 Q You gave that instruction on December 19th, right?

15 A On the date that we learned of it--I learned of it.

16 Q You were down in the plant regularly, right? So you
17 heard about it just about at the time it happened, right?

18 A It was around--after hearing it, I don't know whether
19 I was at the plant or whether he called me. I seem to recollect
20 speaking to Eaton over the telephone.

21 Q In other words, it was a matter of sufficient impor-
22 tance for him to call you on the telephone, right?

23 A Correct.

24 Q And did you find out when he and Fishman went back
25 to Judge Birns?

1 A I think it was several days later. I think he had a
2 little difficulty finding Fishman. I think it was on the week-
3 end, if I recollect right. Or a holiday.
4

5 Q Do you know when the next order came down in connec-
6 tion with the Diane's Bar tap?

7 A I believe it was several days later.
8

9 Q Would it refresh your recollection if I told you that
10 it was January 6, 1971?

11 MR. FELD: '72.

12 A I don't recall, sir.

13 MR. FEITTEL: The second Diane's Bar order, please.

14 MR. FELD: There it is.

15 Q Would you please take a look at 2, Government's 2.

16 THE COURT: Why don't you offer it in evidence?

17 MR. FEITTEL: I'll offer it in evidence.

18 THE COURT: You know, you're not going at a break
19 neck pace. I hope as we get moving we can accelerate this a
20 trifle.

21 (Government's Exhibit 2, received in evidence.)

22 MR. FEITTEL: For the sake of the record, will counsel
23 stipulate that the order is dated January 6, 1972?

24 THE COURT: It's in evidence. Now let's move on.

25 Q Do you know if Fishman was away from December 19th to
January 6th?

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A I don't know that.

THE COURT: Do you know if Judge Birns was away?

THE WITNESS: I don't know, sir.

Q Now, with respect to this conversation that you had on or about December 19th, where Eaton told you that Steve and Beans were two different people, who did he tell you Steve was and who was Beans?

A I don't recall.

Q You didn't take any notes, right?

A No, sir.

Q Do you have any notes at all in connection with this investigation as the supervisor of these people?

A No, sir.

Q And in that conversation of December 19th--

A Excuse me, sir, may I correct something? I might have signed some of the reports that are in the investigative folder, meaning I read the notes, and I initialled them or signed them. But I don't have them at my disposal.

MR. FEITTEL: Could I call for those now, please?

MR. PEPPER: Your Honor, I don't have in my possession nor am I aware of any notes--

THE WITNESS: Not notes, the investigator's report, memo books.

MR. PEPPER: May I have one moment to check to see if

1
2 we do have them?

3 THE COURT: Let's not take time now. You go ahead.

4 Q In connection with your conversation with Eaton at
5 or about December 19th, apart from the different persons who
6 were Steve and Beans, who did he tell you the fellow on the
7 phone was that he had overheard who had turned to the side to
8 talk to Beans?

9 A I don't recall, sir.

10 Q So you don't know who that person is at all, right?

11 A I don't recall, sir.

12 Q And that turned out to be a person not in anyway
13 connected with the case. Is that right?

14 A No. I believe that Beans is Dellacava and Steve is
15 Della Valle.

16 Q Della Valle. Who was the gentleman who was talking
17 on the phone who turned around and addressed something to "Beans?"

18 A I don't know, sir.

19 Q You don't know who that gentleman is at all, right?

20 A You will have to ask Eaton. I'm not that aware of
21 the investigation.

22 Q And it was that day that you found out--when for the
23 first time did you hear the name Dellacava?

24 A I don't recall. Subsequent to--probably subsequent
25 to that time.

Hill-cross

Q Now, did you hear, in listening to the tapes from day to day, which you didn't, didn't you?

A No, sir, I didn't.

Q You didn't listen to the tapes?

A Only pertinent conversations.

Q Well, were you able to determine--if a conversation was recorded in full, would that indicate to you that it was pertinent?

A It may mean that the officers believed that it was pertinent.

Q So that if you went over the logs you could determine or not that a conversation was recorded in full?

A If you went over the logs you would see if the conversation was recorded in full, yes.

Q When you saw that a conversation was recorded in full did you undertake to listen to the conversation?

A Not all conversations, no, sir.

Q Is there any reason why as the supervisor at the very beginning you didn't undertake to see if the men were following instructions by listening to the calls they had recorded in total?

A It was my opinion that they were performing their job in a competent, efficient manner.

Q Now, did you learn at anytime that conversations of

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Hill-cross

Dellacava were recorded before the 19th of December, 1971?

A I don't recall. I'll have to read all the notes.

Q Well, do you know now that several of his conversations, unrelated in anyway to the commission of crime, were recorded prior to December 19th?

A I'll have to review all the notes, Counsel.

Q Did there come a time when you got a set of instructions from Mr. Fishman in writing as to how to conduct taps?

A No, sir.

Q Well, were you in this case in 1972?

A I was transferred from S.I.U. I believe it was the end of March, 1972.

MR. FEITTEL: May we have a clean copy, please, of the Government's copy of the document addressed, a letter to all police officers from Clifford Fishman with respect to Warrant 71/1972?

MR. FEPPER: I so produce it.

(Document handed to Mr. Feittel.)

MR. FEITTEL: May we have this marked for identification?

(Government's Exhibit 3, marked for identification.)

Q Now, would you please take a look at Government's Exhibit 3 for identification and read same and tell us whether this refreshes your recollection that Mr. Fishman at a certain

Hill-cross

point in time in connection with this case generated a written memorandum to the officers involved prescribing procedures?

A You want me to read the whole thing?

Q Read it until you can tell us whether it refreshes your recollection that you ever saw this document before.

A I never saw this document before.

Q And do you know if you were assigned in this case at the time that wiretap order 71/72 went into operation?

A I have some notes. May I refresh my recollection?

Q Yes, certainly.

A What is the number of the wiretap, sir?

Q 71 of 1972. That's a New York County D.A. system.

A Do you know what the date is?

Q It's not on here. I can't tell.

MR. FEFFER: I can represent that memorandum was issued sometime during the summer of 1972 after this officer was out of S.I.U.

MR. FEITTEL: I accept that.

Q During the period of your assignment as supervisor did you hear any comments made from Mr. Fishman that he was dissatisfied with the scope of the monitoring and interceptions that were going on?

A No, he never said that to me.

Q During the course of the operation of the Diane's

Hill-cross

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2 Bar order number 1 and the following orders, did you ever have
3 any occasion to discuss with Mr. Fishman the question of whether
4 or not the officers were over listening?

5 A I don't ever recall.

6 Q You never had such a discussion with them, right?

7 A I said I don't recall, sir.

8 Q Did you ever find out why Mr. Fishman prepared and
9 distributed a letter to the officers in the case giving them
10 instructions in writing regarding minimization or monitoring?

11 A No, I have no knowledge of it, sir.

12 Q Well, in the course of your work in this case did you
13 have occasion to listen to conversations between Mr. Dellacava
14 and his girlfriend, Jean?

15 A I don't recall, sir.

16 Q Do you know there are such conversations that were
17 recorded of Mr. Dellacava and his girlfriend Jean prior to
18 December 19th in their entirety?

19 A I'll have to review the entire notes of the ex parte
20 order. It's been two years., sir.

21 Q In the course of all of the time you spent working
22 on this case, did you ever listen to any telephone call which
23 you told anyone of your subordinates they should have cut off
24 at a certain point in time?

25 A No, I haven't.

Hill-cross

1 Q Never told them once to minimize, right?

2 A No, no. I told them to minimize. I didn't say
3 minimize, I didn't use that term. I told them I want them to
4 monitor the conversations and I thought they were doing an
5 adequate and efficient job.
6

7 Q How did you know they were doing an adequate and
8 sufficient job?

9 A Because I perused the notes daily.

10 Q You didn't listen to the tapes except on specific
11 ones they described?

12 A The ones they called to my attention.

13 Q If they didn't call it to your attention you didn't
14 bother, did you?

15 A I read the notes.

16 Q You never undertook to sample conversations they didn't
17 tell you about?

18 A Yes, I did.

19 Q You did?

20 A I listened from time to time. I went to the wire while
21 some of the conversations were coming over.

22 Q In connection with those you turned off the machinery
23 from time to time. Isn't that correct?

24 A That's correct.

25 Q When you were not there to give instructions with

Hill-cross

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2 respect to those calls, did you listen to those, too, at a
3 subsequent time?

4 A Yes, some.

5 Q So your testimony now is that you did listen to some
6 of the tapes, right?

7 A That's correct.

8 Q And that you didn't garner your information in its
9 totality simply from the logs and the notes, right?

10 A That's correct.

11 Q You went right to the tapes, right?

12 A Sometimes.

13 Q Sometimes?

14 A Periodically.

15 Q How often did you go to the tapes?

16 A Two or three times a week.

17 Q That's the times you went up to the plant?

18 A That's correct.

19 Q You would listen to the tapes up at the plant?

20 A That's correct.

21 Q You mean you would replay the tapes to yourself?

22 A They had a machine there and I played them.

23 Q They had two machines there at the plant, right?

24 A I don't recall.

25 Q Well, they had a machine recording, didn't they?

Hill-cross

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A Yes, but you can turn off the machine and play it back and listen.

Q So that while the plant was in operation you would stop the machine and play calls back, right?

A That's right.

Q If another call took place at or about that time you would lose the call, right?

A I don't recall that ever happening, sir.

Q In other words, it was all your good fortune when you stopped the machine nobody ever put a dime into that coin box and nobody ever called in on the phone. Is that right?

A I don't recall it ever happening.

Q So every time you came up there you would play back the machine, is that so, and listen to calls they had taken that day, right?

A No, sir. I would just sit there and monitor the calls for a period of time.

Q As they were coming in?

A That's correct.

Q I'm talking now also about the previous product that went down on to tape before you got there, did you or did you not ask them to play those back for you?

A If it was a pertinent one.

Q Only the pertinent ones, right?

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A That's correct.

Q The ones they told you about, right?

A Sometimes they brought the tape down to the office and we would play it on the machine there.

Q A pertinent call, right?

A That's right.

Q And if they didn't tell you it was pertinent, you didn't have any occasion to listen to the tape, right?

A If it was non-pertinent, except when I was present, yes, sir.

Q Did you ever have any discussion with Mr. Fishman respecting a situation where two people would be on the telephone and the officer ostensibly didn't know the identity of the voices in question, as to how long he could stay on the wire to listen?

A It was my instructions to the men--

Q I didn't ask you that. I asked you did Mr. Fishman ever discuss that.

A I recall Mr. Fishman reading some notes to me where he stated that he wanted to stress the point--we spent three hours together, I believe, on the day we got the ex parte order. He kept referring to notes constantly, talking about privileged communications on the phone and about who you could listen to and who you couldn't listen to.

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Hill-cross

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2 Q I'll repeat my question. Did he ever discuss with
3 you the situation in which the persons, your fellow officers,
4 your subordinates, who were listening in on these plants would
5 hear voices that they couldn't identify, how long they could
6 continue to monitor the conversation of unidentifiable voices?

7 A I don't recall.

8 Q So you don't even know if it came up in the conversa-
9 tion, right, because you have no specific recollection or it,
10 right?

11 A I recall many conversations but that specific wording
12 that you're using there, I don't recall, sir.

13 Q Do you recall telling your brother officers that if
14 they didn't know who was on a wire and they weren't sure whether
15 it was a named party, they could keep listening to the call in
16 its entirety until they found out the identity, right?

17 A I told my officers that they could listen--once they
18 determined that the subject was not the person named in the wire
19 they were to turn it off. It was very difficult, they were talk-
20 ing in code.

21 Q In other words, your instructions to them was that they
22 had to be first satisfied that it wasn't a person named in the
23 order before they were required to turn it off, no matter how
24 long the call went on. Is that right?

25 A My instructions to them were that they could listen

Hill-cross

and once they were positive that the person who we had named in the wire wasn't the subject, they were to turn it off.

Q They had to be convinced it wasn't a person named before they turned it off, right?

A In their opinion.

Q And as long as the period of doubt existed in their mind they could listen even if that call went for hours, right, according to your instructions?

A I didn't give it that explicitly.

Q Did you ever tell them that there is a point beyond which, even if they're not sure who is talking, that it's time to get off; didn't you ever tell them that?

A It's time to get off when they're sure that the person named in the wire is not the one speaking, that's when it's time.

Q Did it ever occur to you that after a certain period of time, a minute, or two minutes, or three minutes where the parties weren't identifiable, that you could play back, if you cut it off at that point, that you could play it back to your informants or other person to get some extrinsic or outside help as to who it was on the call rather than continuing on the wire?

A I never included informants on my investigation after it's investigated.

Q You were working with a large team of officers, weren't

Hill-cross

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2 you?3 A The team fluctuated between four and eight or nine
4 men.5 Q Well, were there any times when you had a situation
6 where you directed that a call be turned off in the middle where
7 you were not sure who the parties were, did that ever happen to
8 you?

9 A No, sir.

10 Q So you always knew who was talking when you were
11 listening, right?

12 A No, sir.

13 Q Did you ever listen in on any phone calls when a named
14 party wasn't talking?

15 A I don't recall. You mean specifically?

16 Q Not Joseph Della Valle on a call.

17 A I was present there on calls where they turned off
18 the tape when they found out it wasn't a person named.

19 Q The sound was coming up to your ears, right?

20 A It might have been two females on the phone and then
21 there's no point in listening.22 Q All such conversations were turned off to your know-
23 ledge. Is that right?

24 A Yes.

25 Q Now, with respect to the Sam-Dennis conversation, do

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you know why that wasn't turned off?

A I didn't know who Sam and who Dennis was.

Q Your objective was to stay on the call for the duration of it, right, even though the conversation had nothing to do with drugs?

A We didn't know.

Q So if you didn't know who the people were who were talking and you didn't know that they were talking about drugs, you kept listening, right, until you found out one or the other right?

A If we determined that the persons that were named in the ex parte order were not on the phone we turned it off. At the initial stages we didn't know who it was on the phone.

Q Now, the person that you were primarily interested in was Joseph Della Valle, correct?

A That's correct.

Q Did it ever happen that Joseph Della Valle got on the phone at Diane's Bar during the course of the first wiretap order to your knowledge?

A I assume he got on the phone.

Q You don't know of your own knowledge, do you?

A No, sir.

Q Nobody ever said to you we got Joseph Della Valle, here's his voice?

Hill-cross

A We thought that Steve and Beans--

Q Don't tell me what you thought. I'm asking you a question, not what you collectively thought.

MR. PEPPER: I think the witness was attempting to answer the very question asked and he should be entitled to answer.

THE COURT: Yes. I will allow him to answer as he was beginning to.

THE WITNESS: Repeat the question, Please.

(Whereupon, the pending question was read back by the reporter.)

A We thought Steve and Beans was the same person.

Q You thought all along?

A Initially.

Q Starting when?

A From the beginning.

Q You also thought Steve and Beansie were one person, right, before the tap started and installed, right?

A You will have to ask Det. Eaton. I'm not aware of that.

Q When did you learn it, mistakenly or not, that Steve and Beansie were the same person initially?

A At that particular conversation when he came over. When Eaton told me, I believe on the 19th, sir, that he feels

Hill-cross

1 Steve and Beansie are two separate persons.

2
3 Q Before that time you must have believed that Steve
4 and Beansie were one person, right?

5 A It was the impression of the investigators.

6 Q But you knew nothing about Steve and Beansie before
7 that time, right?

8 A Except for the notes.

9 Q So Steve and Beansie's names came up in the notes?

10 A Right.

11 Q You had no independent knowledge that Joseph Della
12 Valle was known as Steve or Beansie at that time, right?

13 A I don't recall.

14 Q You later found out that Joseph Della Valle was also
15 known as Steve and Beansie, right?

16 A You will have to ask Det. Eaton. I'm not sure, sir.

17 Q Can you tell me when for the first time Joseph
18 Della Valle's voice came up on the Diane's Bar tap tape?

19 A I don't recall.

20 Q So you don't know when for the first time there was
21 a breakthrough on the identification of Joseph Della Valle's
22 voice, right?

23 A No, sir.

24 Q But you had been hearing all along they didn't know
25 what Joseph Della Valle's voice sounded like, right?

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A They weren't sure.

Q That uncertainty continued on for some time, did it not?

A That's correct.

Q And it was finally resolved when?

A December 19th.

Q December 19th?

A You will have to show me the papers again.

Q You're talking about paragraph 9 where somebody turns and says "Beansie?"

A Yes.

Q That's the first time you say that was Joseph Della Valle. Is that what you're saying?

A I'm saying we learned in that conversation that there were two people. Steve and Beansie were not the same person. We originally thought that Steve and Beansie were Dellacava.

Q You subsequently learned what, that Steve and Beansie were who?

A Initially we thought Steve and Beansie were Della Valle. We learned later on that they were two separate persons. That's when we made applications.

Q That Steve and Beansie were two separate persons?

A That's correct.

Q And initially--are you saying that you initially thought

Hill-cross

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2 that Steve and Beansie were the same person and that that
3 same person was Della Valle? Is that what you are saying?

4 A That was my impression.

5 Q Who told you that.

6 A Eaton and the others.

7 Q That Steve and Beansie were Della Valle?

8 A It was their opinion it was.

9 Q To your knowledge did they write this down in the
10 logs in connection with the calls dealing with Beansie and
11 Steve?

12 A They didn't know.

13 Q Did they make any notes that they showed you, anywhere
14 on the logs or on the transcripts that these calls that one
15 Steve or one Beansie was on that that was the voice they believed
16 to be Joseph Della Valle?

17 A They told that to me verbally.

18 Q On the night of December 19th?

19 A On the 19th when we learned that Steve and Beansie
20 were two separate individuals, that's when they told me.

21 Q Now, somebody turned around and said something to
22 Beans, right? Can you tell me what about that conversation
23 alerted you to the fact that Beans was different from Steve?

24 A It was the detective's opinion that Steve and Beans
25 were two separate people.

Hill-cross

Q All right, now, which one was supposed to be Della Valle, Steve or Beans?

A I asked Det. Eaton.

Q You don't know?

A I don't recall, sir.

Q Up to that point had you ever heard Della Valle's voice on the phone?

A I don't recall, sir.

Q Wasn't there a tap in at Theiriot Avenue in the Bronx?

A That's correct, sir.

Q Didn't Eaton open up the tap there?

A You will have to show me the opening notes.

MR. FEITTEL: Will the Government turn over to us the Theiriot Avenue logs?

MR. FEFFER: Your Honor, that's the same logs they asked for before and I represented that we do not have the original logs, as far as I know, of Theiriot Avenue. We have a copy.

That's the same copy you have there.

MR. FEITTEL: The very same?

MR. FEFFER: I presume so.

MR. FEITTEL: Ours is marked up.

MR. FEFFER: Your Honor, I don't have an extra copy. It seems to the Government if they were intending to use this

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2 for cross examination they should have made a copy for that
3 purpose. We don't have an extra copy.

4 MR. SLOTNICK: I'm not going to quibble, Your Honor.
5 I'm not in the Xerox business either, but I listened to those
6 tapes, I received copies of the logs and I made it explicit they
7 would be used in trial. Perhaps we can get together with the
8 Government this afternoon after trial is over and see what we
9 need and we will Xerox it or they will. We don't need to quibble
10 over the exhibits.

11 I would ask that this marked copy be entered as an
12 Exhibit 1D and that we substitute an unmarked Xerox copy to-
13 morrow morning so the procedure can continue.

14 MR. FEFFER: That's no problem, Your Honor. In the
15 interim I will attempt to get the originals, if I can, which
16 may save this process.

17 THE COURT: All right.

18 MR. FEITTEL: May we have this marked, 1D?

19 MR. FEFFER: 1C.

20 (Defendant's Exhibit 1C, marked for identification.)

21 Q In your discussions with your informant--

22 A It wasn't my informant, sir.

23 Q The informant that you spoke to at Lakeville Road,
24 the exit on the Long Island Expressway, did he tell you in any
25 way what the voice of Joseph Della Valle sounded like?

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Hill-cross

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A No.

Q Young, old, gruff, pleasant?

A I don't recall, sir.

Q Do you know how old Della Valle was at that time?

A I believe he was in his 20's.

Q Did you know he was living at home with his parents?

A I don't know specifically, sir. I don't recall.

Q The tap on his home phone went in on December 10th, did it not? Take a look at 1C for identification and tell us if this refreshes your recollection.

A Is this the opening of the ex parte order?

Q That's what the Government gave us and I take it so to be.

A Det. Mallard and Det. Eaton were on plant, they opened the plant.

Q They opened the plant, right?

A Yes.

Q Now, this question about the identity of Joseph Della Valle's voice, could you tell us when, if ever, it was resolved?

A I don't recall, sir.

Q Well, you examined the logs and the transcripts, didn't you?

A Two years ago, sir.

Hill-cross

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Q You didn't make any notes about that either, right?

A No, sir.

Q You don't have the foggiest idea how long it took to determine with certainty what the voice of Joseph Della Valle sounded like?

A I'll have to review the entire investigation, the entire logs.

Q Isn't it a fact that very, very shortly after the logs or taps were installed at Theiriot Avenue that Joseph Della Valle had conversations on his telephone which were monitored in full or in part?

A I'll have to review all the notes.

Q You don't know that?

A I don't recall, sir.

Q Isn't it a fact that your subordinates were in a position by December 11th to determine with good certainty what Joseph Della Valle's voice sounded like?

A In my opinion, no sir, they were not.

Q Do you know that they recorded his voice ostensibly on November 11th--December 11th?

A I'll have to read the notes.

Q And you knew before then that Eaton, who was involved in both plants, had listened in on two conversations--

THE COURT: Come on, Mr. Feittel.

Hill-cross

Look, I want you to move along a little more briskly. I'm going to interpose my own objections to these questions if, as this happening increasingly, it seems clear to me that you're not doing anything useful. Let's try to proceed.

Q Isn't it a fact that on or about 1250 on December 10, 1971, Joseph Della Valle was taped during an entire conversation from the Theiriot Avenue address?

THE COURT: Now, look, do you have a suspicion what the answer to that is going to be?

MR. FEITTEL: I know what the answer is going to be. It's going to be yes.

THE COURT: No, it's going to be he doesn't know.

MR. FEITTEL: If he says that, I'm going to ask him to refresh his recollection.

THE COURT: Move on. You have much better evidence on this than a man who has told you a hundred times in order to answer such a question. You have the tapes. You will have the monitoring officers. I want you now to proceed.

MR. FEITTEL: Could I make a statement at the side bar, Your Honor, just to preserve the record on this point?

THE COURT: No. You may make a statement in open court to preserve the record.

MR. FEITTEL: You're asking me to telegraph my point.

THE COURT: I'm asking you to move on. If you wish to

Hill-cross

make a statement, I will hear you.

MR. FEITTEL: I wouldn't, Judge, not under these conditions.

THE COURT: Proceed.

Q On December 10th or thereabouts, did you have any conversation with Det. Eaton in which he told you that he had heard the voice of Joseph Della Valle on his own home telephone?

A I don't recall any specific conversation on a specific date.

Q Did you learn at or about that time, December 10th, that Joseph Della Valle, whose voice was taped on that day, was referred to in your logs as Blackie?

A You will have to show me the logs, you will have to show me everything.

Q I show it to you and ask you if it refreshes your recollection. I'm showing you C for identification. Under date of 12 December, '71, 12:50.

MR. FEFFER: Your Honor, may I interpose this objection? It hasn't even been established on the 11th that Det. Eaton was at the plant. In fact, the logs indicate he was not at the plant on the 11th.

MR. FEITTEL: That's for cross examination, Judge. I don't think it's proper to develop this just en passant in the place of testimony.

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2 MR. FEFFER: The logs are here and they certainly
3 speak for themselves as to who was at the plant.

4 THE COURT: They don't really speak for themselves
5 just because somebody's initials are or aren't on them.

6 MR. FEFFER: I think the question should be addressed
7 whether Eaton was there at the plant on that day before we get
8 into a whole line of questioning as to what he told him.

9 THE COURT: No, he doesn't have to do that.

10 Go ahead.

11 Q Do you understand the question? Do you remember the
12 question?

13 A Read the question back to me, please.

14 (Whereupon, the pending question was read back
15 by reporter.)

16 A I see the plant was opened by Det. Wolfe and Morgan.
17 It doesn't say anything about Eaton in here.

18 Q Do you see the content of the conversation described
19 in which Blackie is mentioned?

20 A It says, "In Jimmy, out Pat."

21 Q It mentions Jimmy's name, nickname, Blackie.

22 A Blackie is written down here, yes, sir.

23 Q Well, based upon that writing on the leg of that
24 date, there came a time to renew the order on January 6th,
25 didn't they change the caption to read Joseph Della Valle, also

1 known as Blackie, also known as Jimmy?

2
3 A I'll have to review the entire case. I don't
4 recall.

5 Q Now, are you telling me that in the days after
6 December 9, 1971, that your fellow officers had a belief that
7 Joseph Della Valle was also known as Steve or Beansie?

8 A Would you repeat the question again, please?

9 (Whereupon, the pending question was read back by
10 the reporter.)

11 A We learned on that date that Steve and Beansie
12 were two separate people.

13 Q You had been listening to calls of Steve and Beansie
14 after the plant went in, right?

15 A That's correct.

16 Q Didn't you tell me before that it was your belief
17 that Joseph Della Valle was possibly Steve or Beansie?

18 A That's what I see, yes, sir.

19 Q Didn't your fellow officers find out on that over-
20 heard Della Valle's--from Della Valle's phone that Joseph Della
21 Valle's nickname was Blackie, not Steve or Beansie?

22 A Sometimes they have fifty names.

23 Q Did you read anything from all of the papers in this
24 case, all of the notes that you signed that said that Joseph
25 Della Valle was also known as Steve or Beansie?

Hill-cross

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2 A I don't recall.

3 Q You don't recall. Was it your understanding that if
4 a conversation didn't deal with narcotics you were entitled to
5 listen to it, if it didn't also include named parties?

6 A If while listening to a conversation another crime came
7 over the phone I would immediately notify the District Attorney
8 and let him know it so we could amend the ex parte order.

9 Q Well, did you find out at any point on December 9th
10 that a police officer had fired off a gun in a bar up around
11 Diane's Bar while drunk, did you find that out?

12 A I don't recall, sir.

13 Q Did anybody on your team report the commission of that
14 crime to the Police Department?

15 A I seem to recall something in the minutes about a gun.
16 I don't recall what else.

17 Q Can you tell me which conversation you overheard that
18 involved parties that you weren't entitled to listen to, that you
19 reported to the District Attorney's office to get an amendment
20 of an order?

21 A I don't recall, sir.

22 Q Can you give me one instance in which you did that?

23 MR. FEFFER: Can we have some representation as to what
24 this conversation is with respect to a police officer shooting a
25 gun, where it appears in the transcript or where it is in the logs?

Hill-cross

THE COURT: I don't think that's necessary.

MR. FEFFER: I'm trying to find out where it is and it's impossible to find any conversation like that.

THE COURT: Is there anything in the logs or any of the materials that you have, Mr. Feittel--

MR. FEITTEL: In listening to the tape I heard that.

THE COURT: Which tape for which date?

MR. FEITTEL: I'm being called upon to do this to justify my question?

MR. FEFFER: I'm trying to find out where he is, in the logs, and what he is referring to.

THE COURT: Mr. Feffer will talk to you about it at lunch hour.

Q What calls did you learn about that disclosed the commission of ongoing crime that you reported to anybody?

A I don't recall which wire. They seemed to intermingle and I'd have to read the whole notes of all this wire so I could answer the question.

Q Did you find out that bookmaking and the numbers game was conducted regularly from the beginning out of Diane's Bar?

A Yes.

Q This you heard regularly on the calls?

A That's correct.

Q You would listen to those calls in their entirety one

1 after another, right?

2 A We would listen for--bookmaking would come over but
3 we wouldn't listen to the complete end of the crime. The Dis-
4 trict Attorney was made aware of these notes.

5 Q You cut those calls off when they dealt with book-
6 making. Is that right?

7 A If we thought that the person mentioned in the ex
8 parte was not one of the principles.

9 Q Well, turning to December 12, 1971--

10 THE COURT: Before we turn to that, Mr. Feittel, let's
11 stop for lunch.

12 Let me mention something for the guidance of all of
13 us. Consulting the court's calendar and the schedule of trials
14 and the fact that a week from today and tomorrow are Jewish
15 holidays, on which it is entirely possible that some of the
16 people here may not wish to work, I reach the conclusion that
17 it will be indispensable to conclude this minimization hearing,
18 as we keep calling it, not later than next Wednesday, which will,
19 on the normal schedule, will have given us five full days, God
20 save us, on this matter.

21 I instruct counsel to consult over lunch and satisfy
22 themselves whether we can finish on or about next Wednesday.
23 Please don't feel that we have to use that much time for this.
24 And if there is any substantial questions about the feasibility
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Hill-cross

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2 of concluding by Wednesday, we will all, to the regret of
3 people like Mr. Slotnick and me who live upstate, and possibly
4 to the regret of other people, have to sit this Saturday. So
5 let me know this afternoon where we stand. 2:15, gentlemen.

6 (Whereupon, a luncheon recess was taken.)
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AFTERNOON SESSION

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2:15 p.m.

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THE COURT: Before you start, Mr. Feitell, Mr. Swansinger reports to me that your judgment is that we ought to sit Saturday to get through. Is that correct?

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MR. FEITELL: We haven't reached a determination. We want to see how the balance of the day goes.

9

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THE COURT: That is the first time in many years that Mr. Swansinger has even been incorrect, but let me know on the end of the day.

11

JOHN J. HILL, resumed.

12

CROSS EXAMINATION CONTINUED

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BY MR. FEITELL:

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15

Q Did you have any conversation with any of the officers in this case concerning the testimony you gave this morning?

16

A Yes.

17

18

Q You talked about some of the questions I had put to you and the answers that you had given?

19

A Yes.

20

21

Q And you were instructed perhaps that you were mistaken with respect to some substantial portions of your testimony?

22

A That's correct.

23

Q And you spoke to Mr. Feffer about that?

24

A Yes, I have.

25

Q And he told you he was going to take it up with you this

2 1 DS/jl

Hill-cross

2 afternoon after he gets a chance when we finish?

3 A No, we discussed and cleared up the discrepancy. I read the
4 minutes and refreshed my memory. This is the first time I read these
5 notes in two years.

6 Q Presumably later on you are going to ^{change} some significant
7 aspects of your testimony based upon the refreshment of your recollection.
8 Is that correct?

9 A That's correct.

10 Q Now, prior to December 19 could you tell us if there were any
11 Beansy or Steve conversations overheard on the tapes?

12 A Well, let me clear up the discrepancy. --

13 Q I am going to let Mr. Pfeffer do that. I want to proceed with
14 my questions.

15 THE COURT: I am not going to let you do that. Either stay
16 away from it or get on to it, but don't ^{titillate} on it. I direct you to
17 let him complete his account of discrepancy into which you started to go.

18 Q You tell us what Mr. Pfeffer said to you when you got off the
19 stand and what you said to him, back and forth, over the lunch hour.

20 A He told me, he said, "Are you positive ^{about} Beans and Steve?"

21 I am all confused, I said, with Beansy, Steve, Della Valle. These names
22 I haven't heard about in almost two years. I said I am very confused.
23 We didn't go over this type of questioning prior to my testimony. I
24 thought I was going to be here speaking about minimization.

25 Q I don't care what you thought. Just what he said to you and what

2 you said to him.

3 A He said I am mistaken with reference to these names and I want
4 you to clear it up. I said, is Stevey and Beansy the same person? I
5 can't recall. Then he went on to explain to me, John did, of the dis-
6 crepancy. I have come to the conclusion now that initially, when we were
7 monitoring the wire, we thought Della Valle, Stevey and Beansy were all
8 one and of the same person. But as of the 19th, when we were listening
9 to the wire, we were still of the same opinion that Steve, Beansy and Della
10 Valle were all one and of the same person. But when the individual who
11 was monitoring on the 19th turned and said, "Hi, Beans", we realized
12 that Beansy and Stevey were the same person and that Della Valle --
13 there was two people involved.

14 Q Tell me, when you say we realized, you mean somebody else
15 realized and imparted that realization to you, right?

16 A That's correct.

17 Q So now you know that Della Valle was a person different from
18 Beans, right?

19 A On the 19th.

20 Q How do you know on the 19th that Beans was a person different
21 from Steve or the same as Steve?

22 A Well, Beans and Steve, according to Eaton, he thought was all
23 the same person when he was monitoring the wire.

24 Q You mean in the early stages of the tape he had determined
25 that Steve and Beans was one and the same person, right?

4 1 DE/jl

Hill-cross

2 A He was of the opinion that Della Valle, Beansy and Stevey were
3 all one and of the same person.

4 Q And now when you learned on the 19th that Beans wasn't Della
5 Valle, who was Steve supposed to be?

6 A George told me that he believed that Stevey and Beansy were one
7 and of the same person. Della Valle was another person. They were two
8 separate people here, not one person.

9 Q George Eaton was in on this conversation?

10 A Yes.

11 Q And he helped straighten you out?

12 A The District Attorney and his two assistants there.

13 Q What time did that conversation start upstairs?

14 A It lasted about five minutes, six minutes.

15 Q You went directly from this Courtroom upstairs?

16 A Went out this Courtroom, went upstairs. Then we discussed five,
17 ten minutes, came down the elevator and took a walk outside.

18 Q You had your lunch upstairs or outside?

19 A Didn't have lunch.

20 Q You didn't have time to get lunch?

21 A Somebody wanted to look at jewelry and I walked over to the
22 jewelry exchange with two other officers.

23 Q Were they in this case?

24 A Eaton.

25 Q Did you talk about the case on the way over?

1 DS/jl
2 A Yes, sir.

3 Q Commented about it?

4 A Yes.

5 Q Isn't this closer to the truth — did you go down the elevator
6 with the United States Attorney, did he go out the building with you?

7 A I don't even recall.

8 Q Did you all come down together?

9 A I was coming down with Eaton.

10 Q You don't remember if Mr. Feffer or Mr. Feld were in the
11 elevator with you?

12 A I don't recall.

13 Q Do you recall walking through the lobby outside with Messrs.
14 Feffer and Feld?

15 A I didn't pay any attention to them. I was speaking to Eaton.

16 Q In other words, they came down with you but you were speaking
17 with Eaton?

18 A If they came down.

19 Q You are not sure of that?

20 A They were of no concern to me.

21 Q You don't even know if you were in the same elevator with them?

22 A That's correct.

23 Q You say you exited from the building about ten minutes after
24 one. Is that your testimony?

25 A Don't put me down to any hours, counsel. Ten or twelve minutes

2 we were up there and then left. It could have been five minutes we left.

3 We took a walk to the jewelry exchange and came back.

4 Q Did anybody tell you to take a walk with Mr. Eaton?

5 A No.

6 Q Who was looking for jewelry, Mr. Eaton —

7 MR. FEFFER: Your Honor, objection.

8 THE COURT: Next question.

9 MR. FEFFER: Sustained?

10 THE COURT: Yes.

11 Q Did Mr. Eaton want some help in picking out jewelry.

12 MR. FEFFER: Objection, your Honor.

13 THE COURT: Let's go on.

14 Q Now, prior to December 19, to your knowledge, were there con-
15 versations of Steve and Beansy that were recorded?

16 A As I recall, they were.

17 Q Were there several of those conversations that were heard in
18 their entirety?

19 A As I recall there were.

20 Q In refreshing your recollection over the lunch hour did you find
21 out where in the papers it said in the early stages of the case that
22 anyone ever said that Steve and Beansy were one and the same as Della
23 Valle?

24 A I had come to the conclusion that we would let George Eaton
25 make all those decisions, make all those notes.

Q You didn't refresh your recollection on that?

A Just a page or two, that's all.

Q Now, going back to December 12, 1971, are you familiar with a conversation that was recorded coming out of or coming into Diane's Bar at 2043 hours?

THE COURT: Mr. Feitell, I almost never intrude on cross examination but I think we have reached about the end of this whole approach which has been singularly unilluminating. The credibility thing is fine. This officer was not monitoring. He occasionally heard. He answered you over and over again that he didn't recall, he would have to read the papers. You are going to have the monitoring officers. If you want to argue with me about the elements of credibility on the things he did participate in, do that some day. But I think I have had about enough of your going to 1543 on December 12 and asking him about things about which he never knows.

Now, if you think he is not telling the truth and denying knowledge, argue that to me later.

MR. FEITELL: Won't your Honor let me get through a call which I have a reasonable belief in telling you that he should have known if he was acting in a supervisory capacity which is really relevant to some of this prior testimony?

THE COURT: He heard?

MR. FEITELL: Or read the logs to apprise himself.

THE COURT: Then what should he have done?

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Hill-cross

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MR. FRITELL: To discount some of the things that he says that these other people told him, because the logs refute it.

4

5

THE COURT: I will allow that if that is what you mean to be doing.

6

7

Q I show you the logs, 1(b) for identification, turning to page 8 thereof, and respectfully direct your attention to the entry at 2043 hours.

8

9

A Are they typewritten?

10

Q Do I have them?

11

A Could I read the typewritten ones?

12

Q Did the Government type them up? These are the originals. For the record that is on 12-12-71. Please read the entry under 2043.

13

A (Witness reading) What do you want to ask me, counsel?

14

Q In reading this does this refresh your recollection that a call took place at that time in which a male and a female discussed Blacky?

15

A No, it does not.

16

Q Does it refresh your recollection that the person on duty at that time noted that Blacky was co-equal with Joseph Della Valle?

17

A That is what it says here, sir.

18

Q Do you have any recollection of having looked at that material at or about the time it was so written?

19

A It was my practice to read all the minutes but I don't recollect specifically, no.

20

Q So that if you read those entries in the log at or about that time and understood what you were reading, you would have an understanding

21

22

9 1 DS/jl Hill-cross

2 that somebody working for you was saying that Joseph Della Valle had
3 another name, Blacky, right?

4 A I don't recollect, counsel.

5 Q You don't recollect having read that, right?

6 A No.

7 Q And part of your job was to supervise these officers, correct?

8 A That's correct.

9 Q And you were supposed to read these logs, right?

10 A I probably did. It was my practice to read all the logs but
11 I had nine wires, counsel.

12 Q So when these people were allegedly telling you that Joseph
13 Della Valle was the same as Beansy and Stavey, what did that mean to you
14 in terms of Blacky being Della Valle?

15 A I can't recall.

16 Q The entry under 1640, the same page, same date.

17 A (Witness reading)

18 Q Do you see the entry there to the effect that Beansy's wife
19 calls for Beansy? Did Joseph Della Valle have a wife?

20 A I don't recall.

21 Q Isn't it a fact that all of Joseph Della Valle's conversations
22 at the beginning of the tap up at Theriot Avenue dealt with the calls
23 to his girl friends?

24 A I don't recall. I haven't monitored the tapes in two years.

25 Q Shouldn't you have known at that time that Joseph Della Valle

10

DS/jl

Hill-cross

wasn't married and didn't have a wife?

A Counsel, I am telling you I don't recall.

Q Did you ever compare any of these logs to find out where it was written, if anywhere, that Beansy and Steve may be the same person as Della Valle?

A Excuse me, sir?

Q Did you ever see it in writing in any of the memos or logs or transcripts that Stevey or Beansy was one and the same person as Joseph Della Valle?

A Initially we thought that Stevey, Beansy was Della Valle, all one person, initially.

Q You thought this despite the fact that the entries in the logs refer to a Joseph Della Valle as Blacky?

A The officers told me and I was of the opinion that Stevey, Beansy and Della Valle were one and the same person until the 19th.

Q Who told you that?

A Eaton and all the men who manned the wire.

Q Did he confirm that to you today, too?

A That's correct.

Q Was he the gentleman who was directly in charge of making these entries on December 12th, to your knowledge?

A Show me the notes, please.

Q I will. (Handing) Who is the first named detective on the

1 plant?

2 A On the 12th?

3 Q Yes.

4 A Detectives Eaton and Mallard.

5 Q So he was there that day, Detective Eaton, at that plant?

6 A Excuse me, counsel. He may have been there at the plant but
7 that doesn't necessarily mean he was there when that conversation came
8 in. You will have to ask him.

9 Q Did they minimize any of Stevey's or Beansy's calls before
10 December 19?

11 A When the person who they believed to be the person that we
12 mentioned in the ex parte order, they listened to their conversation.

13 Q In other words, but Stevey or Beansy wasn't named, we know
14 that, as a named person, right?

15 A We believed that Stevey, Beansy, Della Valle were all the same
16 person.

17 Q Therefore, up to December 19 you continued to listen to Stevey
18 and Beansy because you thought he was Della Valle, right?

19 A Beansy, Stevey, and Della Valle we thought were the same.

20 Q You, being the main person in authority, you had authority to
21 listen to the others, right?

22 A Yes.

23 Q You listened to these calls as they were recorded?

24 A You will have to ask the officers. You will have to let me
25

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Hill-cross

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review all the wires.

3

Q Could you tell me whether the calls of Stevey and Beansy were

4

turned off prior to the 19th?

5

THE COURT: Why don't you ask the people who are going to be

6

here who were doing the turning on and off?

7

MR. FEITELL: This is the issue of supervision which they

8

talked about in Byram Tortorella.

9

THE COURT: Don't the records show what is turned on and off?

10

MR. FEITELL: Judge, I am making a record here.

11

THE COURT: Wigmore doesn't say you can do anything you want

12

because you are making a record. I am trying to put this thing within

13

manageable limits. He could only now look at those records for you, which

14

you can do yourself, for the points you are trying to make. I have

15

said this repeatedly and now I guess I had better say I mean it.

16

Q After December 19, every time your people heard Steve and Beansy,

17

did they continue listening to his calls?

18

THE COURT: No. Next question. I want you to go on and stop

19

asking him -- I am going to terminate your examination in one minute unless

20

you follow my directions. If these directions are erroneous I have made

21

them explicit enough on the record so anybody who looks over the record

22

will know they are erroneous. I don't want to have to keep repeating it.

23

I do not want you to attempt to elicit any more testimony from this

24

witness which will consist of nothing more than his reading the report

25

that is before you that you can read yourself. Now, follow that.

13 1 DS/jl

Hill-cross

2 MR. FETTEL: There is one more question on this.

3 THE COURT: No more questions on this. You go ask a question
4 that is permissible within the ruling that I have just made for about
5 the fifth time.

6 MR. FETTEL: I have to test these things out. I am listening
7 to you and at my peril I am going to ask it in good faith.

8 THE COURT: If you are in good faith listening, nothing bad
9 will happen.

10 MR. FETTEL: All right, your Honor.

11 Q Now, on December 19, after you found out that Beansy and
12 Steve was not the named party, Della Valle, did you give instructions
13 to the officers to minimize the calls of Steve and Beansy?

14 A I gave instructions that they would immediately contact Fishman
15 at the first opportunity and be governed by whatever he tells you.

16 Q And that was all you said to them, right?

17 A That's correct.

18 Q You didn't tell them that pending any new order or amendment to
19 the then existing order they should seriously minimize the Steve Beansy
20 calls, right?

21 A No, I didn't.

22 Q This machine, could you tell us if it is very much similar to
23 the machine at the plant?

24 A Yes.

25 Q Does that machine have the capacity to record and cut off the

2 sound at the same time so that there could be no audition or monitoring
3 while a recording is actually taking place?

4 A Repeat that again, please.

5 Q Could the machine be operative taking down conversations and
6 at the same time the sound be cut off?

7 A Yes, it can.

8 Q Was the machine that you used up there a tubed or a transistor-
9 ized machine?

10 A I am not an expert. I don't recall.

11 Q Was the machine on at all times up there or was it ever turned
12 off?

13 A Turned off when the officers left the plant.

14 Q So, was the machine, as they say, hot all during the operations
15 of the plant before it was closed?

16 A The machine was on while the officers were present. It was
17 turned off when the officers left.

18 Q Do you know what the practice of the officers was or did you
19 give them any instructions as to whether or not they could listen to
20 conversations but not tape them?

21 A To listen to the conversations?

22 Q Listen but not tape.

23 A No.

24 Q Does the machine have a capacity to give forth sound without
25 taping?

15 1 DS/jl

Hill-cross

2 A You are getting very technical here and I don't know if I am
3 qualified to testify about the technical aspects of the machine.

4 THE COURT: If you don't know, just say you don't know.

5 A I don't know.

6 Q Now, each day when the tape was closed down, what happened to
7 the tapes?

8 A The machine was left intact. Closed it down, we secured the
9 premises.

10 Q You left the tape on the reel?

11 A That's correct.

12 Q And you would pick up the next day. Was that your instructions?

13 A That's correct.

14 Q And when you concluded, when you ran out of tape, so to speak,
15 what happened to the reel?

16 A It would be sealed and we would deliver it to the District
17 Attorney.

18 Q When did that happen, as you finished off each reel?

19 A Well, if it was finished off at 2:00 o'clock in the morning
20 you wouldn't do that. You would do it at the first convenient time when
21 the District Attorney was present.

22 Q Was it a regular practice to virtually immediately seal the
23 tapes and run them over to the D.A.'s office for safe keeping?

24 A As soon as the notes were taken down, it was a rather arduous
25 job to do the notes. As soon as we could do that, the first opportunity

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DS/jl

Hill-cross

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it was delivered to the D.A.'s office.

3

4

Q So you gave up ~~control~~ and possession of them very shortly after the tape was used up?

5

A These were my instructions.

6

7

Q Did these officers take these home to play them back on their own machines?

8

A Not to my knowledge. If it was it was contrary to my instructions.

9

10

Q Was there a practice of going back over the tapes to determine whether or not conversations which were at first bluish innocuous really had something in them of import?

11

12

A We listened to a lot of tapes over and over and over, yes.

13

14

Q And when you did that did you have to go back and get the tapes that had been sealed?

15

A We usually did it before we brought them over.

16

17

Q So that where you see — withdrawn.

18

Are you familiar with the entries on the log which shows, for example, male talking to female, and then superimposed over the name of one male would be a scrawl giving the name of that male? Have you ever seen that in the logs?

19

20

A Why don't you show it to me?

21

22

Q Addressing your attention to page 7 of 1(b) for identification, specifically call at 1960 hours, the designation "male". Do you see the name Beansy written in there, too?

23

24

25

A Yes, I do.

17 1 DS/jl

Hill-cross

2 Q Now, in your judgement was the name Beansy written down
3 contemporaneously, at the same time that the word "male" was put in there
4 or did somebody come back, to your knowledge, and put in the name Beansy?

5 A To my knowledge, I don't know. I am not a hand writing expert.

6 Q If the person that was listening in the first instance knew
7 it was Beansy, he would write in Beansy, wouldn't he?

8 A If he suspected it was Beansy.

9 Q If he wrote "male" it was because he didn't know who was talk-
10 ing on the phone.

11 A That's correct.

12 Q If he played the tapes back to somebody or he discovered that
13 it was Beansy he would go back and scratch in the name of the speaker.
14 Is that correct?

15 A For clarity, that would probably be a reasonable explanation.

16 Q And it is your testimony that this business of going back over
17 the tapes and reviewing them was a practice in time that was carried out
18 very closely, within a day, so to speak, that you finished up the calls?

19 A When the wire was usually concluded, whatever we missed while
20 taking the notes we would go over.

21 Q When you say the wire was concluded do you mean the wire tap
22 order had run out?

23 A The tape that is on the machine.

24 Q So, you would run it back?

25 A I wouldn't.

18 1 DS/jl

Hill-cross

2 Q When the tape had spun out. Is that right?

3 A I wouldn't. It was the procedure that the officers followed.

4 Q Wasn't there a practice in this case to defer sealing these
5 tapes so that the officers could regularly, in some comfortable situation,
6 and not under pressure, review the tapes to glean from it more significant
7 information?

8 A I don't know. I don't recall.

9 Q Would it be a fair statement, to your knowledge, that within
10 twenty-four to forty-eight hours the tapes were given up and sealed to
11 the D. A. in each instance?

12 A I wouldn't say that.

13 Q So that in some instances the tapes were held longer, right?

14 A I don't recall.

15 Q Well, did you have an understanding with Mr. Fishman as to how
16 you meant to get the tapes back or defer delivering tapes to him?

17 A By instructions from Mr. Fishman he wanted them delivered as
18 soon as possible.

19 Q What did he tell you as soon as possible meant?

20 A As soon as possible.

21 Q What did you interpret that to mean?

22 A As soon as possible.

23 Q Well, what would be the contingencies that play into as soon as
24 possible?

25 A If a tape was not concluded; there were not very many days — some

19 1 DE/11

Hill-cross

2 tapes would last for a week, four days, five days. If there were a lot
3 of conversations it would only last for a number of hours.

4 Q Once the tape was completed and off the machine for use purposes
5 in connection with taking down conversations your practice was very
6 quickly to get that tape over to Mr. Fishman?

7 A Not exactly right. The practice was then to make up the
8 minutes word for word. It was very arduous and it was time consuming.

9 Q Were there any receipts developed from Mr. Fishman to indicate
10 when these items were turned over to him, that you know of?

11 A I don't know about any.

12 Q To your knowledge the original boxes indicate the dates of
13 original sealing?

14 A I don't know. You will have to show me the boxes.

15 Q This isn't within the scope of your knowledge, right?

16 A That's correct.

17 Q With respect to the discovery of other on going crimes, do you
18 know of any instance where news of an on going crime was delivered to
19 Mr. Fishman for an amendment to the order?

20 A No, I don't recall.

21 Q Would it refresh your recollection with respect to a number of
22 telephone calls regarding book making, was anything done respecting amend-
23 ing the order to take care of book making overheard?

24 A Not to my knowledge.

25 Q There were a substantial number of conversations dealing with

20 1 DS/jl

Hill-cross

2 book making. Is that correct?

3 A Correct.

4 Q Did you give your officers advice that with respect to book
5 making that they should cut off those conversations, that they were not
6 germane to the inquiry?7 A If they felt that one of the subjects that was involved was
8 named in the wire, they could listen.9 Q Did they ever play any of those many tape recorded conversa-
10 tions dealing with gambling for you, for you to determine whether or not
11 this the persons were engaged in/alleged conspiracy regarding narcotics?

12 A Gambling I am not interested in. I am only interested in drugs.

13 Q So isn't it a fact that what happened here was that the officers
14 took each and every conversation regarding gambling and really did
15 nothing about it, except listen in?

16 A They notified the District Attorney.

17 Q They didn't amend the order, right?

18 A In his opinion it was unnecessary if they didn't amend the
19 order.

20 Q In whose opinion?

21 A The District Attorney.

22 Q Was Mr. Fishman given instructions as to these officers to
23 stop listening in on the book making overhears?

24 A I don't know.

25 Q Did you discuss this with him?

21 1 DS/jl Hill-cross

2 A I don't recall.

3 Q You never told him there was a lot of book making conversations,
4 did you?

5 A He could read it. It was in the notes.

6 Q You knew it too, right?

7 A That's correct.

8 Q Did it trouble you in any way?

9 A No.

10 Q As far as you were concerned it was okay to listen to all of
11 those conversations in their entirety, right?

12 A No, sir, I didn't say that.

13 Q Well, what was your feeling about listening to those book
14 making conversations in their entirety when named parties in the order
15 were not on those conversations?

16 A I instructed the men not to listen to anybody who was not
17 named in the ex parte order. If they suspected it was a person named
18 or if they knew, they could listen.

19 Q Did it ever come to your attention or were you aware of the
20 fact at the time that numerous conversations regarding book making on
21 the tapes did not have the voice of Steve, Beansy, Della Cava or Della
22 Valle or any other co-conspirators in connection with this conspiracy,
23 are you aware of that?

24 A My instructions to the men were not to listen to conversations
25 where they knew the person named in the wire was not there, they would

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Bill-cross

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turn them off.

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Q What was your understanding regarding parties who were conducting a conversation during the course of which they would mention Della Valle's name or Blacky's name, was it your understanding as regards those conversations between parties not named that the conversations could continue to be audited from beginning to end?

A If the person was not named in the wire they could not be monitored.

Q Well, do you know if Mr. Fishman gave an instruction that where two people not named in the order were talking about Blacky or Della Valle, that they could listen in anyway?

A You will have to ask Mr. Fishman. I don't recall any such.

Q Did you get a chance to review the letter that he wrote to the officers in the summer of '72?

MR. FEFFER: Your Honor, objection. The letter of '72 came approximately nine months after this wire tap was concluded.

THE COURT: All right, sustained.

Q Now, are you familiar with the designations that were posted on the logs? That is in terms of asterisks and short form letters. Are you familiar with those?

A Show me the forms and I will see.

Q Do you remember the Sam-Dennis conversation this morning with the asterisk, do you remember that one?

A No.

Q Do you know when asterisks were put on these logs? Let me help

you find it. The first page, 1545. What did that mean to you?

A You will have to ask the man who made it. It says here Eaton

or Mallard.

Q You mean there is no practice or routine with regard to short

form designations or signs or signals on the logs that was commonplace,

understandable to all parties involved?

A You will have to ask the man who made these.

Q Do you know what the letter P stands for?

A P? Show it to me, please.

Q Let's take the letter NP.

A That means not pertinent.

Q When did you first find that out?

A That was my instructions, that if it was a non-pertinent

conversation we wouldn't monitor it. You would put NP down.

Q Do you know whether or not there were any calls which are

designated NP on these logs that were heard from the beginning to the end?

A I don't know. You will have to show me an example, sir.

Q We will do that some other time.

What about a designation like EP, what does that mean?

A You will have to ask Mallard or Eaton.

Q Well, if you had read the logs you would have read EP, right?

A Yes.

Q You probably would have asked them what it meant at that time

2 if you didn't know what it meant, right?

3 A Not necessarily.

4 Q Here is another one with an asterisk and the letter EP on
5 12/12/71 at twenty hundred hours. Take a look at that. Do you ever
6 recall seeing that letter EP with the asterisk next to it?

7 A I don't recall.

8 Q Do you know now what EP means?

9 A No.

10 Q And you never asked that you can recall, right?

11 A I don't recall.

12 Q Are you sure you read these logs?

13 A I did.

14 Q Did you ever get a copy for yourself to review in your office?

15 A I usually reviewed the second — the second copy was for the
16 office.

17 Q But you were working on nine wires?

18 A Supervising.

19 Q And you didn't have time to look at all of these things, is
20 that so?

21 A That is not so. I review them, sir.

22 Q So you acknowledge that as part of your responsibility you
23 should have read the logs.

24 A Correct.

25 Q You should know what is in them?

25 1 DS/jl

Hill-cross

2 A Have an idea generally what is in them, what is pertinent.

3 Q You should have been looking for entries in there to see that
4 the officers were following the Court's instructions, right?

5 A They were.

6 Q What did you do when you heard conversations in foreign
7 languages?

8 A I don't recall hearing those, sir.

9 Q Well, did you ever hear a conversation with a lady and a
10 whether
11 furniture store in which she was asking if the man could get her a
12 buy on muebles, furniture?

12 A I don't recall.

13 Q Did you give instructions to the officers that all conversations
14 conducted in any other language except English were to be listened to in
15 full?

16 A Did I give that? No.

17 Q Do you know if that was their practice?

18 A I don't believe they were.

19 Q You didn't believe they did that?

20 A I don't recall.

21 Q To your knowledge do these logs contain each and every call
22 that appears on the tapes?

23 A To the best of my knowledge they do.

24 Q Well, did you ever run through a reel of tape, just on a test
25 basis, to see whether the officers were really putting down all of the

26

1 DS/jl

Hill-cross

2 calls they heard?

3 A That was not my responsibility. It was the first line super-
4 visor.

5 Q Who was that?

6 A Sgt. MacDonald.

7 Q Do you know if he did it?

8 A I don't know. You will have to ask him.

9 Q Did he ever tell you that he found in several instances that
10 there were calls on the wires that weren't in the logs?

11 A No, he never told me that.

12 Q Do you know of any?

13 A Not to my recollection.

14 Q You told us that you were from time to time, would listen to
15 the tapes. Didn't you hear any tape calls that didn't show up in the
16 logs?

17 A If it was on the non-pertinent, the routine would be that as
18 soon as the call comes in, they log the time it comes in. If it is not
19 pertinent, they say non-pertinent. If they can identify the people, they
20 identify the people.

21 Q What does MD on the logs mean?

22 A You want to show me the logs, please?

23 Q If I tell you that the letters MD appear from time to time in
24 the logs, would you know what that means?

25 A Could you show me the logs, please.

2 Q You can't tell me the answer to that without seeing the letters
3 MO, right?

4 A Two years ago is a long time. It could mean anything, male in
5 male out, female in, female out.

6 Q MO. What else could it mean?

7 A Modus operandi.

8 Q You read those?

9 A Yes.

10 Q You don't know that MO means machine off?

11 A It could be machine off.

12 Q The notes reflecting the logs, did you review those, too?

13 A Yes.

14 Q Those were the preliminary officer's notes that they made while
15 they were listening, right, and replayed?

16 A I reviewed them.

17 Q You actually saw them physically, they were shown to you by the
18 officers, correct?

19 A I observed them making the notes while they were listening to
20 the recording.

21 Q Did you give them any instructions to preserve those original
22 writings?

23 A I don't recall.

24 Q Do you know if they exist now?

25 A I don't know if they exist.

2 Q Did Mr. Fishman give any instructions regarding the preservation
3 of those materials?

4 A You have to ask Mr. Fishman.

5 Q You never heard him say anything about that, did you?

6 A I don't recall.

7 Q If he said it do you think you would have remembered it?

8 A I don't recall, sir.

9 Q Did you ever speak to Frank Rogers before you went out and had
10 these plants installed?

11 A Are you talking about the head of the narcotics?

12 A Yes.

13 A No, sir.

14 Q The only person you dealt with in the case was Fishman?

15 A And indirectly with Mr. Hogan. He signed the order.

16 Q You spoke to Mr. Hogan?

17 A I waited out in the hallway. Mr. Fishman spoke with him.

18 Q So that is how you dealt with him directly, right?

19 A With the District Attorney, that's right, through Mr. Fishman.

20 Q Now, when you went to see Mr. Fishman -- you went to see him
21 with regularity during this period, correct?

22 A Not with regularity.

23 Q How often did you go to see Mr. Fishman to tell him how things
24 were going at the plant?

25 A It was the responsibility of Det. Eaton to do that, sir.

2 Q What was your obligation with respect to liaison with Mr.
3 Fishman after the plants went in?

4 A If there was any problem that we had with any detectives he
5 would call me, which I don't recall him ever having done.

6 Q He would find out if there was a problem through Mr. Eaton,
7 right?

8 A That's correct.

9 Q Did you say -- what is your exact title or what was it at that
10 time?

11 A Detective Lieutenant in Charge of Group B of the Special
12 Investigation Unit, Narcotics Division, New York City Police Department.

13 Q You were in a supervisory capacity, is that right?

14 A Correct.

15 Q After these tapes got into operation how often did you go back
16 to Mr. Fishman to get word or instructions from him so you could go back
17 to your subordinates to give them supervision, how often?

18 A The first line supervisor was responsible to give them super-
19 vision. My duties were administrative.

20 Q What do you mean by administrative?

21 A Running the entire squad, the other wires, making sure they got
22 materials they needed, they got the proper help, scheduling of tours,
23 et cetera. Many, many other duties.

24 Q And it was in your job to listen in on the tapes, right?

25 A The job specifically was to the detectives assigned to the case

2 to listen to every word that was coming over the wire.

3 Q You say you were in an administrative capacity. Do you mean
4 by that that it was a part of your job to review these logs as adminis-
5 trator?

6 A That's correct.

7 Q So you are telling us that as administrator your job involved
8 actually knowing what the men were doing in the plant and what was coming
9 out of the tapes, right?

10 A It was primarily the duty of the first line supervisor. I
11 was the second line supervisor.

12 Q It is your testimony that you reviewed all of the logs and
13 read them through, right?

14 A It was my practice to daily read all the notes that came in for
15 that previous day.

16 Q Did you ever make any markings on any of the logs that you can
17 point to me to show that you underlined anything or initialed anything?

18 A You will have to show me the logs. Maybe I did.

19 That's the original copy, counsel?

20 Q Yes.

21 A I wouldn't touch the original copy.

22 Q You wouldn't touch it?

23 A Yes.

24 Q But they had copies you told us, right?

25 A Yes.

Q You told us that before. Those were the ones you worked through,

right?

A That's correct.

Q Where are those?

A I assume they are in the SIU, Special Investigation Unit's

file.

Q Do you have any recollection that you marked those up in any

way?

A I may have. I don't recall.

MR. PEPPER: Your Honor, they have a copy. The Xerox copy

that was provided was from the copy that we received from the New York

City Police Department. Not the original ones. The Xerox copy that

was provided all counsel was Xeroxed from the logs that the officer is

talking about.

MR. FEITELL: Will counsel concede then that there are no

markings in the hand writing of this witness?

MR. PEPPER: I have never seen this gentleman's hand writing,

so I have no idea.

MR. FEITELL: Do you have a copy of the logs, a Xerox copy?

MR. PEPPER: You have a copy.

MR. FEITELL: Marked up.

MR. PEPPER: Then you marked it up.

Q Does anything come to mind that you ever wrote down on any of

these logs?

2 A I don't recall.

3 Q You have been over the logs recently, have you not?

4 A No, sir. Two years ago.

5 Q Did you make any notations on other pieces of paper drawn
6 from your reading of the logs?

7 A No, sir. Not to my recollection.

8 Q What did Mr. Fishman tell you, if anything, about spot listening?
9 Do you know what spot listening is?

10 A Spot listening?

11 Q Yes.

12 A I assume -- I can only assume what you mean. If you will
13 clear it up a little more, I will.

14 Q What do you assume I mean?

15 A You mean periodically go in on a conversation?

16 Q Right. Did you do it, find out it's not pertinent?

17 A Well, it was my instructions that if the person named in the
18 wire you suspected could come on the wire you would put it on and turn
19 it off.

20 Q Did you ever do that? Did you ever have spot listening in
21 this case in and out of a conversation?

22 A Not to my recollection.

23 Q So that when they ^{had doubt} who was talking on a conversation
24 did you ever instruct your officers to duck out for a while and then come
25 back in and see if they could figure it out later on?

A No.

33 1 DS/jl Hill-cross

2 Q You told them to hang in there and go through the end, right?

3 A Only if they believed the suspect was named on the wire was
4 there. If it was not a person described in the ex parte order they were
5 to turn it off.

6 Q Did you ever find out from anybody when they first believed
7 they zeroed in on Joseph Della Valle's voice?

8 A I believe sometime after the 19th.

9 Q Did you ever listen to the tapes up at Thieriot Avenue to
10 listen to Della Valle's voice yourself?

11 A I have listened to him but I don't recall anything specific.

12 Q At the beginning of those tapes in Thieriot Avenue did you ever
13 bother to listen to Della Valle's voice?

14 A I remember listening to it but I don't have any specific
15 recollections of anything.

16 Q Did you ever play / the Thieriot Avenue tapes, side by side, against
17 what you were hearing on the Diane's Bar tapes in order to compare the
18 voice of Della Valle?

19 A Side by side? I don't recall, sir.

20 Q Or within a narrow frame, physically and time wise, so you
21 could recall from hearing up at Thieriot Avenue that some of these par-
22 ticular voices down in Diane's Bar was Della Valle's voice. Did you ever
23 do that?

24 A I don't recall, sir.

25 Q Did you ever suggest to anybody that was a way to approach the

34 DS/jl

Hill-cross

2 problem of ambiguity regarding Della Valle's voice at Diane's Bar?

3 A I don't recall giving those instructions.

4 MR. FEITELL: That is all, your Honor.

5 CROSS EXAMINATION

6 BY MR. SLOINICK:

7 Q Sgt. Hill --

8 THE COURT: Are you demoting him?

9 MR. SLOINICK: No, your Honor. I don't have that authority.

10 Q I am sorry, what is your rank, officer?

11 A Lieutenant.

12 Q My apologies, Lt. Hill.

13 In the scheme of things during December 1970, tapping of
14 Joseph Della Valle , we have established that you were a superior officer
15 in an administrative capacity responsible to whom?

16 A Responsible to the Deputy Inspector.

17 Q What was his name?

18 A Was this in December?

19 Q Yes.

20 A I believe it was James McGoey.

21 Q James McGoey or some other Deputy Inspector?

22 A McGoey I believe it was.

23 Q Did you have periodic meetings and conversations with him with
24 regard to how things were going on the wire taps that were outstanding
25 at that time?

35 1 DS/jl

Hill-cross

2 A Yes. I brought him up to date on anything pending, anything
3 happening.

4 MR. SLOTNICK: While I am questioning, your Honor, before the
5 lunch break it was promised that the Government would/whatever reports
6 they had with regard to this officer. If that is possible, maybe Mr.
7 Feitell could look them over while I am questioning.

8 MR. FEFFER: The Government, as far as I know, does not have in
9 its possession any reports of this officer with respect to the testimony
10 that has been given this morning.

11 MR. SLOTNICK: All right.

12 Q And during December of 1971, you had how many wires going at
13 that time? You testified to nine, I believe.

14 A May I look at my notes?

15 Q Of course.

16 A I had the records checked from September 13 to December 8,
17 and there was a total of eight and I know there were one or two in the
18 summer. Approximately eight or nine, maybe ten, maybe twelve. I don't
19 remember.

20 Q Nine wires, or nine, ten, eleven wires going. You acted in
21 the same capacity which you acted with regard to these wires?

22 A That's correct.

23 Q Now, I show you Exhibit 1, which you have seen before and have
24 read the caption. I presume you have read the Judge's order, Sergeant.

25 A I have perused it.

Q Is there any question in your mind that the subject and the

2 only person to be overheard on the wire taps was one Joseph Della Valle
3 speaking to other people.

4 A Co-conspirators and possibly people that could be involved.

5 Q But only if he was speaking to them, Sergeant?

6 A That is why we made the application.

7 Q Thereafter as you indicated if the officers listened to two
8 females, they were, one, going against the dictates of the order, and two,
9 they were going against your instructions. Am I correct?

10 A Yes.

11 Q Prior to your obtaining a wire tap, an eavesdropping wire for
12 Joseph Della Valle, there was some investigative work that was done and
13 it was corroborated by yourself. Is that correct?

14 A That is how I got involved, yes.

15 Q Could you tell us what you did prior to making the application
16 and prior to going to the District Attorney's office with regard to
17 Della Valle?

18 A Eaton came to me and told me he had reason to believe, by the
19 result of having information from a confidential informant, that he
20 believed Joseph Della Valle was involved in the transactions of major
21 narcotics deals.

22 Q You signed an affidavit to that aspect of the case. Is that
23 correct?

24 A That's correct.

25 Q Any you met sometime prior to this warrant being issued with a

371 DS/jl

Hill-cross

2 male in Nassau County--

3 MR. FEFFER: Objection on two grounds. One, it is totally
4 irrelevant for the purpose of this hearing. Secondly, a large part
5 of this was covered by co-counsel.

6 THE COURT: The second thing bothers me more than the first.
7 Mr. Feitell was not brief, and if you are planning to repeat what he
8 has covered I would like you to plan something else.

9 MR. SLOTNICK: I wouldn't do that, your Honor.

10 THE COURT: Objection sustained. Next question.

11 MR. SLOTNICK: I was going to get to another area.

12 THE COURT: Get to that area, please.

13 Q During that period of time you met with either a Donald Bodie
14 or a Micheal Cassis. Is that correct?

15 MR. FEFFER: Objection, your Honor. This is the same question
16 in another form as to who he met with. Nothing to do with the purpose
17 of this hearing.

18 THE COURT: Where will it go?

19 MR. SLOTNICK: To the credibility of Det. Eaton. The reliable
20 confidential informant, who really isn't confidential, has been revealed
21 to me through Mr. Feffer and through my own investigation. It is either,
22 as admitted in open Court by Mr. Feffer in another proceeding, it is
23 either Bodie or Cassis and there really is no great secret about it, it
24 is Bodie. I want to know if he is going to confirm what Eaton says and
25 whether his affidavit conforms to what Eaton says. He may say one and they

2 may say the other.

3 MR. FEPPER: I don't know in what proceeding Mr. Slotnick is
4 referring to that I ever mentioned either of the two names. Secondly,
5 the name of the confidential informant has not been disclosed as far as
6 I know through our office to anybody. Thirdly, it is totally irrelevant
7 for the purpose of minimization hearings.

8 THE COURT: How does this effect minimization or does it effect
9 something else?

10 MR. SLOTNICK: Probable cause and eventual credibility, your
11 Honor. It is an affidavit placed before the Court that helped to obtain
12 the eavesdropping warrant.

13 THE COURT: I understand that. But are you going to try to
14 show that Lt. Hill's affidavit is false in some way?

15 MR. SLOTNICK: Not Lt. Hill's affidavit. If it comes out that
16 way it does.

17 THE COURT: But you don't propose to be showing that.

18 MR. SLOTNICK: At this stage of the proceeding until I have his
19 answer, I don't know, your Honor.

20 THE COURT: Then you may not have his answer. Objection
21 sustained.

22 MR. SLOTNICK: With regard to the probable cause issue that is
23 for another day, I presume.

24 THE COURT: I am not sticking at what day it is for. If you
25 mean to start an exploration without first having gone forward with your

39 1 DS/jl

Hill-cross

2 own case in chief, under the instructions I gave you yesterday, I believe,
3 on that subject, I mean not to permit you to do it under the law as I
4 understand it relating to the controverting of warrants.

5 Now, as to the administration of this thing, of which I have not
6 done a very good job, I am going to rule that this is a minimization
7 hearing. And if and when you want to start a proceeding to controvert
8 the warrant, let me know and we will start that as the next chapter, all
9 before next Wednesday. But we are not going to mix the two together.

10 On that basis I think you can go on to something else.

11 MR. SLOINICK: On that basis I stand corrected.

12 THE COURT: All right.

13 BY MR. SLOINICK:

14 Q You have indicated during the course of your supervision you
15 would appear at the plants, and in this case there were two plants in
16 operation, is that correct?

17 A Periodically.

18 Q Do you remember what plants were in operation?

19 A In this particular case?

20 Q One near Theiriot Avenue and one near the Diane's Bar?

21 A Both of them were in schools.

22 Q Both of them were in schools. Now, you have indicated that you
23 at times would make a little check and you would sit and watch the
24 officers. Is that correct?

25 A I would sit and chat with them and discuss the case and calls

2 would come in while I was there.

3 Q What happened when a call would come in?

4 A They would monitor the call. They would turn it on. If it
5 was a pertinent conversation they would listen at length.

6 Q I am not familiar with how this business operates. There is
7 a tape re^Corder on a table. Is that correct?

8 A That's correct.

9 Q It is plugged into some box someplace that has telephone boxes.
10 Is that correct?

11 A I would rather you call an expert on it. I am not.

12 Q What did you observe there at the plants?

13 A I observed the machine go on, listen to it. If it was a non-
14 pertinent they would jiggle the handle on the right and turn the machine
15 off. If it was pertinent they would let the machine go on and listen.

16 Q And while this machine was turning around was anybody doing
17 anything else?

18 A Usually we would also stop because we all wanted to listen and
19 find out what the conversation was.

20 Q When were notations made?

21 A Simultaneously while they were listening and after when they
22 concluded the tape.

23 Q No, at the time we are listening, let's stay to the time we
24 are listening, was there an officer in your observations during those two
25 plants at that period of time, was there an officer sitting at the table

2 with a sheet of paper making notations?

3 A I do recall that on several occasions.

4 Q Do you also recall a typewriter being in the plants?

5 A Yes, sir.

6 Q Do you recall seeing officers typing at the time?

7 A They wouldn't type when the conversations came on. Usually
8 they wouldn't.

9 Q When would they type?

10 A Well, in the dead period when there were no conversations
11 coming on.

12 Q Do you remember any conversations that you overheard as the
13 spindles were turning during that period of time, if you remember, any-
14 thing at all.

15 A I don't recall, counsel. I don't recall.

16 Q Now, we have characterized Exhibit 1(b) as logs. Is that
17 correct? And those are the logs (indicating).

18 A These were the wire tap minutes.

19 Q How were those made, if you know?

20 A Each time a conversation would come in, 1356, a phone number,
21 whoever answered, no answer. If that was a dial out we had an impulse
22 recorded there.

23 Q Which would record the phone number?

24 A That was another thing, if it was an out going call.

25 Q And so as it happens someone would write all this information

42

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DS/jl

Hill-cross

2

down and as a result of that we retained logs.

3

A That's correct.

4

Q And on other occasions there were little notations made or extensive notations made. Am I correct?

6

A There were notations made.

7

Q At times you observed the officers writing, as much of the conversations as they could pick up.

9

A I observed the officers writing. Specifically I don't recall who, what, where.

10

11

Q Now, you indicated to us that you were aware of the fact that 722-9595 was a public telephone. Is that correct?

12

13

A That is the number on the bar, that is a public telephone.

14

15

Q Getting back to the fact of Joseph Della Valle and prior to your invocation of the order, did you go to any police file to attempt to find out as much as you could about the individual named Joseph Della Valle?

16

17

A That was the responsibility of the detective.

18

Q Do you know if he did?

19

A I am almost sure he did but you could check with him.

20

21

Q And do you remember what report he gave you with regard to Joseph Della Valle, as to whether he had a B number, whether he was 22, whether married, unmarried, any of those factors?

22

23

24

MR. FEPPER: Objection, your Honor. This may go to probable cause but has nothing to do with monitoring.

25

43¹ DS/jl

Hill-cross

2 MR. SLOTNICK: It does. I think when we get into the advanced
3 stage of this proceeding and that machine is turned on, I think, your
4 Honor will be aware of the fact that the voice alleged to be Della
5 Valle is not that of a twenty year old chap nor could any reasonable man
6 so believe.

7 THE COURT: Well, my problem is that I know the answer, I know
8 it is not going to help you and it is not going to help me, but you like to
9 ask all those questions that you figure out to ask and it is quicker to
10 let you ask them than to keep fighting with you.

11 Overruled. Answer the question.

12 A Repeat the question, sir.

13 (Question read)

14 A Specifically, I don't recall. You will have to ask Det. Eaton.

15 Q You have indicated earlier you knew he was a young chap, in
16 his twenties.

17 A Certainly he was in his twenties.

18 Q As the supervising officer you would receive some report from
19 the detective prior to his request for an electronic eavesdropping warrant.
20 Is that correct?

21 A That's correct.

22 Q And you had not brought that report to Court today. Is that
23 correct?

24 A I haven't reviewed that report in two years.

25 Q There is a report that exists?

44 1 DS/jl

Hill-cross

2 A I don't know. I would have to look at Eaton's notes.

3 Q Isn't it a matter of fact that prior to an officer making
4 a formal request for an eavesdropping warrant he has to submit a report
5 to you in writing which you had to submit to a deputy inspector above
6 you?

7 A That's right.

8 Q Therefore there is no question in your mind that Det. Eaton
9 filed an official written report with you prior to your approval and
10 the Deputy Inspector's approval of an eavesdropping warrant. Is that
11 correct?

12 A I don't recall if that was the case with this specific one but
13 that is the routine, sir.

14 Q Now, do you know whether Sgts. Eaton, Navoa, Wolfe, Mallard,
15 Morgan, Cortazzo do you know whether they worked together?

16 A Detectives -- may I refresh my memory?

17 Q Truthful answers will be enough.

18 A Roche, Morgan were partners. Eaton, Mallard, Navoa, and there
19 was another name, were partners. There were two separate teams.

20 Q You were aware of the fact that Wolfe, Morgan and Roche worked
21 on the Della Valle Theiriot Avenue tape and Eaton, Mallard, Cortazzo
22 worked on the Diane's Bar tape?

23 A The wire at the home wasn't very active. Some of them I had
24 to put down -- because of logistics I put them down at the bar.

25 Q It was more active? A Yes.

45 1 DS/jl

Hill-cross

2 Q In other words, the men that were at the bar and at the home
3 were being interchanged.

4 A Not as a routine. As a routine I would want to keep one team
5 at the house and one at the bar. But as I recall we needed more men at
6 the bar.

7 Q So you took some of the detectives off the house and brought
8 them down to the bar.

9 A As I best recall.

10 Q As a matter of fact when the Thieriot Avenue wire tap opened
11 up there was present at that time when the plant was opened, Det. Mallard,
12 Det. Eaton, Wolfe, Navon?

13 A On the 10th it was opened up. Mallard and Eaton were present
14 when the wire was initially opened up.

15 Q That is at the Della Valle home?

16 A At the home.

17 Q And who else was there at the time?

18 A Here at 1530, this is the first time Wolfe showed at the plant.
19 1600 Eaton and Mallard left the plant.

20 Q Then Morgan came?

21 A Two hours later Morgan came into the plant. As they came in
22 it was their routine to sign in.

23 Q And the first call, according to the logs, is a wrong number. Am
24 I correct?

25 A Here it is. "In female, out male. In says wrong number."

46 1 DS/jl

Hill-cross

2 Q That is a wrong number?

3 A Yes, non-pertinent.

4 Q And the first completed call that is listened to at 1809 is
5 made to an attorney. Is that correct?

6 A I don't know who Mr. Slotnick is.

7 Q That is me.

8 A Is that you, sir?

9 Q Yes. If I told you that the second conversation was at 1620
10 between two females and ran for about a half hour or so, would that have
11 been in direct contravention of your orders?

12 MR. FEFFER: Objection, your Honor. I believe Mr. Slotnick
13 is referring to the logs and the monitoring at Thieriot Avenue. Is
14 that correct?

15 MR. SLOTNICK: That's correct.

16 MR. FEFFER: I thought we were here to determine whether the
17 monitoring at Diane's Bar --

18 THE COURT: Sustained.

19 MR. SLOTNICK: The same officer is involved, the same super-
20 visor is involved. Common scheme. Two females, twenty minute conversa-
21 tions.

22 THE COURT: If it is all that clear to you don't ask about it.
23 If you want to argue about it later I might not consider it material.
24 They might have behaved on one and not on the other. I am going to focus
25 on the two that are before me.

47 1 DS/jl

Hill-cross

2 Q As a supervising officer are you aware of the fact that if a
3 modification were to be requested of an eavesdropping warrant you should
4 first go to the Judge that originally issued the order. Is that correct?

5 A My instructions were to contact immediately the District
6 Attorney who handled it.

7 Q And do you know that he would normally go back to the original
8 issuing Judge, are you aware of that?

9 A I would think that would be the normal practice.

10 Q Are you also aware of the fact that if the original issuing
11 Judge was not available, he would go to another available Judge?

12 A This is my opinion.

13 Q So there would be no problem -- withdrawn.

14 And you know the first eavesdropping warrant terminated on
15 January 6, 1972?

16 A Well, thirty days from whenever we put it in.

17 Q And the second one commenced on January 6, 1972, adding
18 Della Cava, are you aware of that?

19 A I know there were two wires.

20 Q So when you indicated to us that on December 19 we got a new
21 order, that was incorrect.

22 A I believe I said we had it amended, sir.

23 Q You had it amended on December 19?

24 A No, no. Here is what I said. I said that I had directed
25 Eaton to contact Fishman because I felt that the wire would have to be

2 amended. We would act according to whatever Fishman's directions were.

3 MR. SLOTNICK: No further questions.

4 THE COURT: We'll take a ten minute recess.

5 (Recess taken)

6 CROSS EXAMINATION

7 BY MR. McALEVY:

8 Q All right, back in December of 1971, were you a lieutenant at
9 that time also?

10 A That's correct.

11 Q And how long have you been a detective?

12 A I started out in 1971, I went to the CIC school -- 1961. I
13 was a detective for five and a half years, a second grade detective.

14 Q I take it you have testified on numerous occasions, have you
15 not?

16 A That's correct.

17 Q And with respect to policy when you were about to be a witness
18 for the State of New York or in this particular case for the United
19 States Government, don't you bring any and all reports that you have made
20 during the course of investigation to Court with you?

21 A I don't have any in this respect, in this particular case.

22 Q Let me ask you this question then, sir: did you not testify
23 that you signed certain reports dealing with this investigation.

24 A That's correct.

25 Q How many different reports did you put your signature to?

49

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DS/jl

Hill-cross

2

A I don't know, numerous.

3

Q Where are those reports?

4

A There is a record in a case folder.

5

MR. FEFFER: Your Honor, those reports are here. What I think the witness is referring to is that he signed —

7

MR. McALEVY: Can we have this at the side bar? I don't know how my worthy adversary can tell me what this witness is referring to.

9

MR. FEFFER: I have discussed it with him. If you want a representation I can give it to the Judge.

11

MR. McALEVY: I would rather you do it that way, sir, at the side bar out of the earshot of this witness.

13

THE COURT: Then don't do it.

14

You may proceed, Mr. McAlevy.

15

Q The only reports you have you gave to Mr. Feffer. Is that correct?

17

A I didn't give it to him. They were in the SILL office, case folder.

19

Q Do those reports pertain to the wire tap back in December of 1971?

21

A Yes, I believe so.

22

MR. McALEVY: Now, Mr. Feffer, do you have those reports in your file?

24

MR. FEFFER: Yes.

25

MR. McALEVY: May I see them?

50 1 DS/jl

Hill-cross

2 MR. FEFFER: No, you may not. They do not refer to this, the
3 testimony of this witness. When Det. George Eaton gets on the stand you
4 might ask again.

5 THE COURT: Let me understand. We are talking about reports
6 made by this officer?

7 MR. FEFFER: No, these reports were not made by this officer.
8 They were signed by this officer in his capacity as a lieutenant. He
9 did not prepare them. They did not relate to his activity. They
10 related to people in his group.

11 THE COURT: But they related to matters over which he had super-
12 vision.

13 MR. FEFFER: That's correct.

14 THE COURT: Why do you wish to withhold them from counsel?

15 MR. FEFFER: Let me explain this first of all. Many of the
16 reports in here relate to surveillances that were conducted in conjunction
17 with the wire tap. The Government does not propose to hand those over.
18 These are inter-related. Other reports pertaining solely to the hours the
19 officers worked, when they got there, where they were at certain times,
20 the Government would have no objection to handing these over but it would
21 like time to go through them to make sure there was nothing in these
22 reports with respect to other investigations. And with respect to surveil-
23 lances which is not the subject of this hearing.

24 THE COURT: Let me understand. You want to separate those out
25 from that which has to do with wire tapping. Is that what you are saying?

51 1 DS/jl

Hill-cross

2 MR. FEFFER: The only thing which is relevant is the way in
3 which the wire tapping was conducted and carried out. These reports
4 mostly go to surveillances that were being maintained --

5 THE COURT: I understand that. Do the reports in part deal
6 with the conduct of the wire tap operation?

7 MR. FEFFER: Only in so far as they say Dets. Mallard and
8 Cortazzo, for example, report to plant. That type of thing and that is
9 already in the logs, in other words the times people get here. There is
10 nothing in here which goes to the method in which the monitoring is
11 carried out. I would be very happy to show these to you or leave them
12 with you, your Honor.

13 THE COURT: All right, much as I would like to figure out some
14 way not to do it, I will look at them and decide whether Mr. McAlevy
15 has any right to see them in connection with this proceeding.

16 MR. FEFFER: Fine, your Honor.

17 THE COURT: Go ahead, Mr. McAlevy.

18 Q Now, let me get this straight: I believe that you testified --
19 well, to save time, you were the number two man with respect to this in-
20 vestigation.

21 A That's correct. No, second line supervisor, sir.

22 Q Who was the sergeant that was --

23 A Sgt. James MacDonald.

24 Q So the sergeant was over the lieutenant in this case?

25 A First line means the man closest to the machine, second line

52 1 DS/j1

Hill-cross

2 is the man second away. Second line is over the first line.

3 Q What were the sergeants' duties?

4 A Where I would have a span of maybe anywhere from 30, 40, 50
5 men, his span was less than mine.

6 Q Are you telling this Court your function was strictly adminis-
7 trative?

8 A No. I went out whenever important matters came up, I would
9 go out to the plant.

10 Q But didn't you say two to three times a week?

11 A That's correct.

12 Q And you would listen to different conversations?

13 A That's correct.

14 Q But was that just sort of like a spot check on your behalf,
15 you would just drop over to these plants?

16 A No, I wanted to be kept abreast of what was going on.

17 Q Did you notify these police officers before you were coming
18 over?

19 A No.

20 Q And most times there are at least two men monitoring. Is that
21 correct?

22 A I wouldn't say that.

23 Q What is the least number of men that would be monitoring?

24 A One.

25 Q Now, let's say with respect to the bar, I believe you said the

2 plant was in a certain school. Is that correct?

3 A That's correct.

4 Q Now, when you first went to that plant did you observe what
5 the arrangement was?

6 A I recall the plant being in a school, yes.

7 Q And someone had to order the tape recorder that was used there,
8 did they not, one of the officers?

9 A The procedure we would use to get the tape recorder there, is
10 that what you want to know?

11 Q Yes.

12 A We would make arrangements with what we call CIB. They handle
13 the installation of all our wires. I don't know if that is the technical
14 term but that is the terminology the police use. We would tell them we
15 anticipate getting a wire assigned such and such a date. We would tell
16 them the number and we would ask them to have someone available to
17 install the wire tap equipment.

18 Q In other words, the way you would be allotted these different
19 things, in this case a tape recorder, you have to make a request for them.

20 A Yes.

21 Q I take it that would be the same as the military services, some-
22 thing would have to be filled out for the commodity needed and it would
23 have to be sent to whatever warehouse they keep these things in?

24 A No. There is a specific unit that does the installation of
25 monitoring equipment. It is their responsibility to install it and to

54

1 DS/jl

Hill-cross

2 maintain it and to find the proper site to put it in.

3 Q But there would be some record somewhere in the confines of the
4 Police Department as to which machine was used at which plant?

5 A I don't know but I would assume that there would be.

6 Q Now, you don't know what the actual type recorder was used on
7 the plant for the bar?

8 A All I know it was a voice activated recorder.

9 Q Let me ask you this: was the same type of machine used for
10 Mr. Della Valle's home?

11 A As I recall, yes.

12 Q The machines were the same?

13 A Or basically the same.

14 Q You operated both these machines, did you not?

15 A I didn't operate them. Men operated them.

16 Q You observed the man and you pointed to this machine and you
17 said you would turn one knob to listen and another knob to shut off?

18 A Yes.

19 Q And a button to get the volume higher and lower?

20 A Yes.

21 Q Can you recall any difference between the two machines?

22 A I haven't examined this machine.

23 Q Is this one of the machines that was used?

24 A I don't know.

25 Q So can you tell this Court now whether or not that machine looks

55 1 DS/jl Hill-cross

2 like the machines that were used in both those plants?

3 A I would say similar to it.

4 Q But you don't know where any record of getting that machine
5 would be in the Police Department, do you?

6 A Well, I would only assume it would be in CIB.

7 Q Who would be the one, who would be the officer or detective
8 who actually, when you wanted to make a plant, actually go through the
9 motions of getting those machines?

10 A Det. Eaton would call up the people and tell them we have an
11 ex parte order.

12 Q In other words, it would be Det. Eaton who is the one that
13 arranged for the machines on this order, the December 8 order. Is that
14 correct?

15 A I don't know specifically.

16 Q Well, you have testified that you have other wire tap investi-
17 gations where you work on, whether it be nine, ten or eleven. Aren't they
18 all done the same way?

19 MR. FEFFER: Objection, your Honor, as to where machines came
20 from. It seems totally irrelevant.

21 THE COURT: No. I will allow it.

22 A I can only tell you the routine, counsel. The routine was when
23 you anticipated having a wire assigned you would notify them in advance
24 so they could have the proper men and equipment available to install it
25 once the wire was assigned.

56 1 DS/jl

Hill-cross

2 Q That wasn't your duty, that would have been Eaton's duty?

3 A Eaton or the sergeant's duty. If they ran into any diffi-
4 culties they would notify me.5 Q I would like to go to your affidavit which you signed, and I
6 am speaking of December 1 now, which you signed on December 8, 1971, Lt.
7 Hill, and I show it to you. (Handing)8 Now, did you not testify today in response to a question asked
9 by my colleague, Mr. Feitell, that the informant that you speak about
10 in your affidavit was not your informant?

11 A That's correct.

12 Q All right. May I direct your attention, sir, to, I believe,
13 paragraph 6 and I ask you to read that and to tell me if that refreshes
14 your recollection as to whether that informant was yours?15 MR. FEFFER: Objection, your Honor. It has nothing to do with
16 monitoring the wire taps.

17 MR. McALEVY: It deals with credibility.

18 MR. FEFFER: If you were looking to probable cause as to whose --

19 THE COURT: The argument I believe deals with credibility.
20 I don't think it is a momentous subject, though.

21 MR. McALEVY: It is not intended to be momentous.

22 A Yes, the informant was George Eaton's informant.

23 Q Did you have a special informant yourself that was used with
24 respect to the conversations between John Della Valle and Joseph Della
25 Valle and : ~~Eaton's~~ : informant back in April of 1971 as set forth in

2 your affidavit?

3 MR. FEFFER: Objection. I am not sure of the relevancy at
4 all.

5 THE COURT: I take it it's the same thought, credibility?

6 MR. McALEVY: Yes.

7 THE COURT: When I say it is momentous, I try to suggest to you
8 it is not going to help you much. Since I am the man who decides
9 credibility I would have hoped you would listen and pay attention. But
10 the objection is overruled.

11 You may answer.

12 A Repeat the question.

13 THE COURT: Repeat the question.

14 (Question read)

15 A I have no confidential informant. The informant in there was
16 Det. Eaton's informant.

17 Q May I ask you, sir, why you said, and I quote from paragraph
18 6, "The confidential informant told me that the other person during the
19 course of the four way conversation told this informant that John and
20 Joseph Della Valle would be willing to supply heroin to my informant?"

21 A I think you are playing with grammar now.

22 Q I beg your pardon?

23 A I think you are playing with grammar. In my opinion the in-
24 formant in question here is Det. Eaton's informant, and not mine.

25 Q When you said in your sworn affidavit, "my informant", you meant

58 1 DS/jl

Hill-cross

2 Eaton's informant and that was just a grammatical mistake on your part?

3 A You will have to let me read it again.

4 Q Certainly.

5 THE COURT: Do not read it again. Next question.

6 MR. MCALEVY: I don't have the answer to that question, your

7 Honor.

8 COURT: I don't care about the answer to that question. I
9 heard the sentence, I heard your suggestion, I will take it into considera-
10 tion. Please proceed.11 Q Who was the first person to tell you that Joseph Della Valle
12 was not in fact Beansy or Steve?

13 A Det. Eaton.

14 Q And he told you that on the 19th?

15 A I don't recall ~~specifically~~ specifically when he tol^d me but it was about
16 at the time of the 19th, yes.17 Q Isn't it a fact and didn't you know that, by way of your affi-
18 davit signed on the 8th, that Eaton had personally heard Della Valle on
19 two separate occasions, to wit, October 29, 1971 and November 2, 1971?

20 MR. PEPPER: Objection, your Honor.

21 THE COURT: Sustained.

22 Q With respect to the foreign language that was set forth -- strike
23 that.24 Did you make any instructions at all to the officers that were
25 working underneath you, ^{did} you give them any instructions whatsoever with

59¹ DS/jl

Hill-cross

2 respect to parties speaking in a foreign language, in a foreign tongue?

3 A I don't recall.

4 Q Have you ever given instructions with respect to, on any of
5 your wire taps, with respect to people speaking in a foreign tongue.

6 A I don't recall, I don't believe so.

7 Q But yet you did look at all these logs?

8 A I perused them, yes, sir.

9 Q Did you ever find anything in those logs when you perused them
10 concerning statements made by your fellow officers concerning foreign
11 language conversations?

12 A I don't recall. I would have to review all the notes, sir.

13 Q But yet you told us that you haven't gone over these affidavits
14 or logs in two years. Isn't that a fact?

15 A That's correct, sir.

16 Q No question about that?

17 A Positively not, sir.

18 Q Do you recall February 3, 1972?

19 A Not off the top of my head, no, I don't, sir.

20 Q Do you know my client, Mr. Leo Guarino?

21 A Would he please stand?

22 (Mr. Guarino rises)

23 A He put on a little weight.

24 Q I take it that means you do know him?

25 A Yes, sir.

60 1 DS/jl

Hill-cross

2 Q Were you working -- when did you start your business with the
3 Auto Squad, Lieutenant?

4 A June 6th of last year.

5 Q What were you working on last February, 1972?

6 A I was in charge of Group B -- if that is the date when I came
7 in contact with this gentleman. Is that the date?

8 Q I am asking what were you doing last February, what investi-
9 gation were you working on, February, 1972?

10 A I would have to look at the notes, but I believe -- if that
11 is when I met this gentleman outside of St. Patrick's Cathedral, is that
12 the day in question?

13 Q I am asking you what were you doing in February, what investi-
14 gation were you on, and I believe you were working with Group B, which
15 concerned this investigation. Is that right?

16 A As well as others, sir.

17 Q No question about it, you were still involved in this investi-
18 gation?

19 A I was in SIU, yes.

20 Q Did you have occasion to meet my client on February 3rd in
21 front of Rockefeller Center?

22 A I placed him under arrest there.

23 Q Now, were you still reading affidavits at that time?

24 A Excuse me, sir?

25 Q Were you still reading affidavits pertaining to this case at

61 1 DS/jl

Hill-cross

2 that time, back in February, 1972?

3 A Yes, sir.

4 Q And did you continue reading there in March, April and May of
5 '72?

6 A No, sir.

7 Q When did you --

8 A I believe I got transferred the end of March.

9 Q Where did you get transferred?

10 A I took command of the 13th Narcotics district in Brooklyn.

11 Q In March you stopped this investigation.

12 A No, I didn't stop it. The investigation was extended.

13 Q Well, with respect to your involvement in this investigation,
14 when did that end? Your actual involvement.

15 A I think it was soon after we placed your client under arrest.

16 Q February. So that cuts the two years down to a year and a half,
17 doesn't it?

18 A Okay.

19 Q I take it that means yes?

20 A Yes, sir.

21 Q That was just a mistake when you said two years?

22 A Not a mistake. It is just general, talking in general terms,
23 sir.

24 Q Six months is just general?

25 A In that time period, sir.

62 1 DS/jl

Hill-cross

2 Q How many times a week would you go to the bar location?

3 A I don't remember specifically, sir. You mean what was my
4 routine at all plants? Two or three times a week.5 Q I take it then your routine was to go to the Della Valle home
6 two or three times a week and also to the plant near the bar two or
7 three times a week.

8 A As well as many other places.

9 Q I am just asking with respect to this investigation. Isn't
10 that true?

11 A That was my routine, sir.

12 Q Are you telling this Court now that there are no reports
13 whatsoever concerning your activities and where you went during this
14 investigation?

15 A Not to my knowledge.

16 Q You never made any notes and reduced those to typewritten
17 reports?

18 A No, sir.

19 Q Any reason for that?

20 Q I am not required, sir.

21 Q By whom?

22 A By the Department.

23 Q After Eaton relayed the information with respect to Della
24 Valle and Steve and Beansy, who did you report it to?

25 A I may have mentioned it to my commanding officer. I don't

63 1

DS/jo

Hill-Cross

2 recall specifically mentioning it.

3 Q All right, was that significant, Det. Eaton's remarks
4 concerning Mr. Della Valle?

5 A It was significant and we notified the District Attorney.

6 Q Did you make a little report concerning that?

7 A No, sir. I don't recall.

8 Q Did any of the officers make a report concerning that?

9 A I don't recall.

10 Q And did you meet with the District Attorney yourself then?

11 A I don't believe so.

12 Q Did the Sergeant meet with him?

13 A I don't know. You will have to ask the Sergeant.

14 Q Do you know from your own knowledge who conveyed this infor-
15 mation to Mr. Fishman?

16 A Det. Eaton.

17 Q Do you know when he did it?

18 A I told him to do it as soon as possible.

19 Q Do you know when that was?

20 A I don't recall.

21 Q And do you know — did you ever find out from Eaton that he
22 did report to Fishman?

23 A Yes, he told me he reported to Fishman.

24 Q How much time elapsed from the time he told you until he
25 reported to Fishman?

64

1 DS/jl

Hill-cross

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A I don't know , sir.

3

Q You made no notes of that?

4

A No, sir.

5

6

7

Q In fact, the only thing you ever did with respect to writing in this case was writing your name on reports that we don't have. Is that correct?

8

A That's correct.

9

Q And is that your common practice in all narcotics cases?

10

A Yes, sir, that is my practice.

11

12

Q Do you know the reason, sir, that you were taken off this investigation?

13

14

A MR. FEFFER: Objection, your Honor. What possible relevancy does that have to the way the wire tap was monitored?

15

16

THE COURT: Is it relevant to minimization , Mr. McAlevy?

17

Come to the side bar.

18

19

(At the side bar)

THE COURT: Make an offer of proof, please. What are you hoping to elicit?

20

21

MR. McALEVY: This man so badly botched up his instructions that he was told to leave and they got him out.

22

23

THE COURT: Okay. I will allow the question.

24

25

(In open Court)

THE COURT: I will allow the question. The reporter will read it and the Lieutenant will answer it, please.

65 1 DS/jl

Hill-cross

2 (Question read)

3 A To my knowledge, I was not taken off unless you are privy to
4 some knowledge I am not. This investigation was offered to me -- this
5 was going to be expanded, this investigation, because they were taking
6 figures
7 on some serious major / and they wanted to make another
8 up specifically. The Chief in charge of narcotics asked me specifically,
9 Chief Saxon, Jules Saxon, if I would want to take command of this in-
10 vestigation. I felt I didn't want to curtail my activities to just one
11 investigation. I felt I had many more irons in the fire and I would
12 rather give my attention to those.

13 Q And that was in what month, sir?

14 A That was when we arrested your client, after we arrested your
15 client.

16 Q Didn't you just testify that you stayed in narcotics for another

17 THE COURT: Don't ask what he just testified. You can argue
18 about that. Ask another question.

19 Q After you arrested my client, where did you go? What particular
20 assignment was your next assignment?

21 A I stayed in narcotics until the end of March, and I believe it
22 was April 1st I took over the 13th Narcotics District where I stayed
23 until June 6, when I was assigned to the Detective Division' Auto
24 Squad.

25 Q In other words some three months after the arrest of Mr. Guarino
you were completely out of narcotics.

2 A When did we arrest him, February what, sir?

3 Q I believe February 3.

4 A That is February, March, April, May, June, that is five months
5 later.

6 Q March, April, May --

7 THE COURT: I will take judicial notice of how long it is
8 from February to June.

9 Q You are telling us that the reason is because you were offered
10 the --

11 MR. FEEFFER: Objection to this question. I think it has already
12 been brought out, the reason why he left.

13 THE COURT: He may present one more question.

14 Go ahead.

15 Q You said that -- what was his name?

16 A Jules Saxon.

17 Q What was his title?

18 A Deputy Chief in Charge of Narcotics.

19 Q And he offered you what position?

20 A No, no. He offered if I wanted -- this investigation was
21 being expanded and he asked me if I wanted to be specifically in charge
22 of this investigation or would I want to stay with SIU and handle my
23 many other investigations and I preferred to stay with the other.

24 Q Do you know whether he did that because you did such a good
25 job on this first investigation in December?

67 1 DS/jl Hill-cross

2 A I know he considered me the top man in the office, that is all
3 I can tell you.

4 Q You were considered the top man in the office?

5 A In my opinion. He made the special recommendation I be given
6 extra compensation.

7 Q Do you still have that opinion?

8 A Yes, sir.

9 MR. McALEVY: No further questions.

10 MR. FEFFER: Just a few questions.

11 THE COURT: You mean it?

12 MR. FEFFER: Very few.

13 REDIRECT EXAMINATION

14 BY MR. FEFFER:

15 Q Mr. McAlevy referred to the arrest of his client on February 3,
16 1972. Was this arrest a direct product of the wire tap going at Diane's
17 Bar at that time?

18 A That's correct.

19 Q Now, will you tell the Court whether anybody else was arrested
20 at that time?

21 A Yes.

22 Q Was Steven Della Cava arrested?

23 A Yes.

24 Q Did Steven Della Cava have on his person \$15,944 in cash at
25 that time?

69 DS/j1

Hill-redirect

2 A He had a large sum of money.

3 MR. SLOTNICK: Objection.

4 THE COURT: On what grounds?

5 MR. SLOTNICK: Irrelevant how much he had on his person.

6 THE COURT: Is it irrelevant, Mr. Feffer?

7 MR. FEFFER: I am trying to establish that as a product of this
8 investigation conversations that we will play for the Court, that they
9 were led directly to Steven Della Cava and Guarino and these conversations
10 will be played in conjunction with Eaton's testimony.

11 MR. SLOTNICK: On that basis —

12 MR. FEFFER: At that time, your Honor, we will demonstrate that
13 various code words were used and that when surveillance was conducted
14 these code words were found out to be a fraud. In fact, they represented
15 different words for narcotic transactions.

16 MR. FEITELL: This goes to probable cause respecting the second
17 order, so I object, too.

18 MR. FEFFER: It has to do with the language utilized by the
19 subjects during the course of wire taps which made it that more difficult
20 for the monitoring officers to listen and to understand what they were
21 talking about. To be specific, your Honor —

22 THE COURT: I understand what you are saying. I will allow it.

23 If the Lieutenant knows the question, he may answer it.

24 Q Just this last question: do you know whether approximately
25 \$15,900 was found on Steven Della Cava?

69 1 DS/jl Hill-redire

2 MR. FEITELL: I object. It has nothing to do with narcotics
3 and I don't know if your Honor knows if that case was presented to the
4 Grand Jury and dismissed.

5 MR. PEPPER: It is presented here.

6 THE COURT: He has explained his rationale for his claim of
7 relevance and I have upheld it. I don't think you should get up again
8 and object to the same question. Overruled.

9 A It was in the trunk of his car.

10 Q Now, Lieutenant, approximately how many men were in your command
11 during the time when the Diane's wire tap was in operation?

12 A I was specifically responsible for twenty-five to thirty men,
13 plus there was a new lieutenant who had come into the squad who also had
14 the same amount of men and I was aiding him during the investigation.

15 Q You referred to a Sgt. MacDonald and I believe you referred
16 to him as a first line supervisor. Is he the individual who had the
17 direct responsibility, the daily responsibility of supervising the men
18 who were monitoring?

19 A That's correct.

20 Q Was he the individual who had the responsibility of seeing
21 that your instructions were carried out?

22 A That's correct.

23 Q And the instructions of Mr. Fishman?

24 A That's correct.

25 Q You also testified, I believe, that the tape recorder was on

70

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Hill-redirect

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whenever the men were in the monitoring station. What does that mean?

3

4

A It means it was turned on. So if a telephone communication came over the tap it would automatically go on.

5

6

Q From that point on you could begin listening and turn the machine off when you wanted to.

7

8

A That's correct.

9

10

Q Over the lunch break, Lieutenant, did I ask you to briefly review the very beginning portion of the logs at Diane's Bar in conjunction with your testimony this morning?

11

12

A That's correct.

13

14

Q And did you do so?

A Yes, I did.

15

MR. FEPPER: No further questions.

16

RE CROSS EXAMINATION

17

BY MR. SLOTNICK:

18

Q Do you know what happened to the Della Cava-Guarino arrest of February, 1972? Were they convicted of a crime?

19

A Not to my knowledge.

20

Q What happened to the case?

21

A I don't know, sir. I was off the case.

22

MR. SLOTNICK: Will the Government stipulate it was dismissed?

23

MR. FEPPER: The Government will stipulate --

24

MR. SLOTNICK: I am asking the Government for a stipulation.

25

Hill-recross

THE COURT: Let a lawyer finish what he has to say.

MR. SLOTNICK: I'm sorry, Your Honor.

MR. FEFFER: The Government intends in fact to use the \$15,900 in this very instant case. So from our standpoint it's hardly dismissed. It may have been dismissed on a local level but we are intending to use this money on this trial.

MR. SLOTNICK: Will the Government stipulate for the Government it was dismissed at a State Court level?

MR. FEFFER: I am not in a position to do that.

MR. FELD: You want to make a representation it was dismissed?

MR. SLOTNICK: My understanding is that it was dismissed at a State Court level.

THE COURT: All right.

Q During February, 1972 was your office working with any Federal officials with regard to Mr. Guarino and Mr. Dellacava?

A I recollect that investigation was started and they were working in conjunction, but I didn't have anything to do with it.

MR. SLOTNICK: Thank you.

RECROSS EXAMINATION

BY MR. FEITTEL:

Q With respect to the \$15,000 some odd dollars that you

Hill-recross

1
2 took out of Mr. Dellacava's car, when for the first time that
3 day, February 3rd, did you learn that he was going to be at a
4 certain place in connection with narcotics?

5 A In the evening, approximately 45 minutes, an hour
6 before.

7 Q Do you know what time the agents listened in on a
8 call indicating anything to that effect?

9 A I haven't read the notes in some time.

10 Q When Eaton first found out about it did he give you
11 a buzz or did he wait?

12 A I called the plant. I was over on the west side, with
13 Sgt. MacDonald and I was instructed to get over there, something
14 is happening.

15 Q What did they tell you is happening?

16 A A pass was going down.

17 Q A pass was going down?

18 A Something going down.

19 Q Who was supposed to be the parties to the pass?

20 A You will have to give me the notes and let me read
21 them closely and I'd be better able to discuss it.

22 Q What notes?

23 A The wiretap notes.

24 Q Do you know if they got in touch with Mr. Fishman?

25 A I don't believe they could.

Hill-recross

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Q How do you know that?

3

A Because I asked him.

4

Q You told him that they should do that?

5

A I told them to call Fishman right away.

6

7

Q When you got news that things were breaking in cases, do you always tell the people who worked under you to go call other people?

8

9

A When it's the District Attorney I do.

10

11

Q So do you remember at any time in this case when you picked up the phone to call Fishman respecting information about fast-breaking events in this case?

12

13

14

A This particular time we felt that the package was going down.

15

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MR. FEITTEL: May I have the transcript respecting the overheards of that day? We don't seem to have them, or at least never given to me from an examination of my own papers. It could have been an omission.

19

20

I think I have it. There have been a number of representations in these orders.

21

22

Q Are you familiar at all with the parties who were involved in that arrest on the defendant's side?

23

24

A You mean who did we arrest that night?

25

Leo Guarino and Dellacava.

Q That's it, right?

Hill-recross

1 A And Brown.

2 Q Where did you arrest Brown?

3 A At h's residence.

4 Q What time was the arrest made out in front of
5 Rockefeller Center?

6 A I don't recall but it was in the evening.

7 Q MR. FEITTEL: Could the Government give us a clear
8 copy of the transcript indicating the hours of the overheard?
9 I'm asking for a clear copy of the transcript.

10 MR. FEFFER: I think you have the same transcripts
11 that we do.

12 MR. FEITTEL: If yours aren't any better, then they
13 aren't.

14 MR. FEFFER: Which conversation are you referring
15 to?

16 MR. FEITTEL: All the conversations of February 3,
17 1972 relating and leading up to the arrest--

18 MR. FEFFER: All those conversations are on one tape.
19 You can play the tape.

20 MR. FEITTEL: I'm trying to find out time.

21 THE COURT: Well, do we need to keep this witness
22 here for that? Isn't that something you can argue later? He
23 doesn't know the time. If you find it on the transcript, fine.
24 You don't have to keep him and me waiting while you mess around
25

Hill-recross

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2 with copies. Next question.

3 Q Now, did you make the arrest?

4 A No, sir.

5 Q Who made the arrest?

6 A Det. Eaton, I believe.

7 Q Isn't it a fact that the first overheard in connec-
8 tion with that night's events related to February 2, 1972, at
9 approximately 9:05 p.m., a conversation between Jack Brown and
10 Steve Dellacava?

11 A Counsel, I haven't read the notes in years. I would
12 have to review them completely.

13 Q All right, I'm going to give you the order for the
14 renewal.

15 THE COURT: Mr. Feittel, I have been sitting here
16 while you and your friends at the defense table have been
17 ruffling through papers. Tell me why you're doing this?

18 MR. FEITTEL: Because now for the first time the
19 Government tells me it's going to use monies seized from the
20 defendant Dellacava.

21 THE COURT: Therefore, what are you doing now that
22 has to do with minimization hearing?

23 MR. FEITTEL: They brought up the issue and it broaches
24 on suppression as well.

25 THE COURT: What are you about to do that is causing

Hill-recross

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2 me to sit and wait with this witness on the stand with those
3 transcripts, none of which he can remember and none of which
4 you're going to get any information from him about.

5 Whatever your ultimate problems may be and goals may
6 be, I don't want to interfere with them. I just want to finish
7 this redirect, recross examination. I want you to move on and
8 ask a question.

9 Q Isn't it a fact there was substantial time between
10 the first call indicating there was something going down from
11 an order secured by a State Supreme Court justice authorizing
12 this search?

13 MR. FEFFER: What search?

14 MR. FEITTEL: The very search you told his Honor
15 about, the \$15,000 taken from the trunk.

16 THE COURT: The arrest?

17 MR. FEITTEL: That's right.

18 THE COURT: What has that to do with this minimiza-
19 tion hearing?

20 MR. FEITTEL: Mr. Feffer brought it up, I didn't.

21 THE COURT: Objection sustained. You heard what
22 Mr. Feffer brought it up for. He had to say it twice.

23 Proceed, please.

24 Q Do you know if any search warrant was procured in
25 connection with that search?

Hill-recross

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A No.

Q Did you ever instruct anyone to get a search warrant?

A We always like to get a search warrant, if possible.

Q I didn't ask you if you like to. Did you ask anyone?

A Excuse me, sir?

Q Did you ask anyone to get a search warrant?

A We can make applications without asking anyone.

THE COURT: He is asking did you. The answer is yes
or no.

A No.

Q Did you call Mr. Fishman before you went out on this
arrest?

A Attempts were made to.

Q Did you recover any narcotics?

A Off your two clients here?

Q I don't have two clients here. I have one client,
Mr. Dellacava.

THE COURT: He wants to know, do you mean from the
defendants here or from anyone.

Q From Mr. Dellacava first.

A No, sir.

Q Did you recover any in the automobile?

A No, sir.

Q Did you recover any from Mr. Guarino?

Hill-recross

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A No, sir.

Q Do you know where that \$15,000 came from?

A I believe it came from Brown's house.

Q How do you know that?

A Because I believe that was the price for the package.

Q Was that discussed on the wiretaps, the price?

A No, sir, I don't believe so.

Q Do you have any knowledge that Mr. Dellacava was observed meeting with Mr. Jack Brown where there was a turnover of monies?

A I have hearsay knowledge from one of my officers.

Q And do you know, was any arrangement made with Mr. Dellacava not to press the State Court case, to your knowledge?

A Not to my knowledge, sir.

Q Was the State Court case as a matter of fact put off in limbo?

A Not to my knowledge.

Q Was it ever presented to the Grand Jury?

A You will have to ask the District Attorney.

Q You don't know?

A No.

Q You never appeared before a Grand Jury to testify over at 155 Leonard Street, did you, about that arrest?

A No, sir.

Hill-recross

1 Q And you never appeared in a Criminal Court hearing
2 to test the issue of legal sufficiency for the arrest, did you?

3 A No, sir.

4 Q Isn't it a fact that the purpose of not proceeding
5 with the investigation or in not proceeding with the prosecu-
6 tion of that State arrest was to guard the integrity of your
7 wiretaps?
8

9 MR. PEPPER: Objection, Your Honor.

10 THE COURT: No, I should think you would be asking
11 that question. It seems relevant to me.

12 You may answer.

13 A You will have to ask the District Attorney.

14 Q You don't know why they did this, right?

15 A No, sir.

16 Q So this was an instance where you had a reason to
17 believe there was going to be an exchange of money for nar-
18 cotics and you went ahead and you were mistaken, right?

19 A I thought that narcotics was possibly going to be
20 involved.

21 Q You were wrong on it, right?

22 A That's correct. It was money.

23 MR. FEITTEL: That's all I have.

24 MR. McALEVY: A few brief questions, Your Honor.

25

Hill-recross

RECROSS EXAMINATION

BY MR. McALEVY:

Q Lt. Hill, did I just hear you testify--

THE COURT: No, no, that question is no good. You can't testify about what you just heard.

Q The arrest of my client, Leo Guarino, and Mr. Stephen Dellacava on February 3rd was made as a direct result from the Della Valle wiretap. Is that correct?

A Initially it was the Della Valle tap.

Q From the first Della Valle wiretap--

THE COURT: Don't ask a question like that.

Wasn't this wiretap order amended in January?

MR. McALEVY: Judge, it's my recollection that the man just testified this was as a result of the Della Valle wiretap.

THE COURT: Fine. If he said that you don't have to ask it anymore. It's on the record and you can get the reporter to read it to you someday. Ask a question on proper recross.

Q With respect to the arrest on the third of February, 1972, there were no narcotics found either on Mr. Dellacava or my client, Mr. Guarino. Is that a fact?

A That's correct.

Q And did you say \$15,000 was found?

A In that area, sir.

Hill-recess

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2 Q Where was that money located?

3 A In the trunk of the car.

4 Q Was that trunk locked?

5 A They were in the process--I don't know who actually
6 grabbed him, but when I got to the scene MacDonald had the 15
7 in a bag which he retrieved from the back of the trunk of the
8 car.

9 Q My question to you is did you see who opened that
10 trunk?

11 A No.

12 Q Did you see Mr. Dellacava open the trunk?

13 A No.

14 Q Did you see the car pull up?

15 A Yes.

16 Q Did you keep the car under your observation the
17 entire time it was there?

18 A There was one car present there before Dellacava
19 pulled up. Guarino was parked there with a female. The car
20 pulled up and Guarino got out and they were at the trunk of
21 Dellacava's car.

22 Q At the trunk of the car or right by the driver's
23 window, sir?

24 A As I recall, they were at the trunk.

25 Q No question about that?

Hill-recross

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2 A We got in a slight motor vehicle accident at the time
3 when we were pulling up.

4 Q My question to you is where was Mr. Guarino when you
5 arrested him?

6 A At the trunk of the car, as I recall.

7 Q Was the trunk open?

8 A I don't recall.

9 Q Who actually went in the trunk and took the money
10 out?

11 MR. FEFFER: Objection to that question and the
12 others. It has nothing to do with the minimization anymore.
13 We are talking about a search of a vehicle.

14 MR. McALEVY: It will be my last question.

15 THE COURT:

16 The last question is objectionable and sustained.

17 MR. McALEVY: Then the question before that was my
18 last, Judge.

19 THE COURT: It's 4:25. In order that we start
20 softening up our close relatives and arranging our own expect-
21 tations, I will now direct that this hearing will continue on
22 Saturday beginning at 10:00 a.m. I hope that all counsel,
23 can assure me that it's clearly unnecessary at the end of
24 tomorrow. If I have such an assurance I will be no less happy
25 than anybody else to rescind the order respecting Saturday.

Hill-recross

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2 But as of now we are expecting to sit on Saturday.

3 MR. PANZER: Would Your Honor require all counsel
4 to be here on Saturday?

5 THE COURT: You tell me if you're not needed on
6 Saturday tomorrow and I will talk to you about it.

7 MR. LEVENSON: If all preliminary hearings are dis-
8 posed of by next Wednesday will your schedule with respect to
9 the Coast Guard case still be on the 4th?

10 THE COURT: I hate to do this, but you can't keep
11 twenty people in the Capra case waiting while you and I have
12 a conversation about the Coast Guard case. Call my secretary.
13 Please sit down.

14 I don't want to do this kind of chit chat business.
15 I have published in the law journal the schedule of the Coast
16 Guard case. Read it and follow it.

17 There was some question about this affidavit, did
18 you want to discuss it or do you want to postpone it?

19 MR. FELD: We can postpone it, Your Honor.

20 THE COURT: I don't see that they have officially
21 been made part of the files of the court, but you will note
22 that they are on file in this case. Is there anything else
23 we have to do this evening before we suspend?

24 MR. FEFFER: I'd like to mark the case file and hand
25 it up to Your Honor.

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2 THE COURT: Mark it for identification and I will
3 take it to chambers.

4 MR. FEITTEL: In my mind, Your Honor, I think I have
5 established and I have advanced in my papers respecting a sup-
6 pression concerning the \$15,000 taken from the back of Della-
7 cava's vehicle. That appears specifically in my motion papers
8 filed on September 5th in connection with the minimization fea-
9 tures of this case. The Government did not respond to the
10 paragraph, my paragraph mentioned in these papers regarding
11 the \$15,900 and my right to suppression.

12 Now for the first time they indicate they are going
13 to use this evidence. This is my first notice of it. I think
14 that the Government was duty bound when we were at the earlier
15 stage regarding suppression of physical items to have adduced
16 this to the Court so we could have taken that matter up at that
17 time.

18 I'm making application now to have a suppression
19 regarding that particular arrest and search.

20 THE COURT: It runs in my mind, I first heard about
21 this money at a bail hearing when this case was first assigned
22 to me. Is that correct, or is that some other \$15,000?

23 MR. FELD: That was the money which was the subject
24 of the suppression hearing that we had already. This was a
25 separate and earlier \$15,000.

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THE COURT: What, if any, response do you have to what Mr. Feittel just said?

MR. FELD: Your Honor, first of all defense has been aware of the fact of the arrest since February, 1972. We have no objection to holding a hearing on that, if that's what counsel's request is.

THE COURT: It's not part of this minimization hearing.

MR. FELD: It's a separate matter and should be treated separately.

MR. FEPPER: I'm not so sure of that. I'm going to counteract my co-counsel--

THE COURT: You had better get one position. Tomorrow morning. Have a caucus.

MR. FELD: One more point, Your Honor. Yesterday you directed us to prepare an order in respect to Mr. Morris which we have done. I have showed it to defense counsel and if the Court is willing to take a look at it, maybe you can sign it now.

THE COURT: Mr. Stone, is that order in proper form and does it give adequate notice?

MR. STONE: It does. On behalf of Mr. Morris he would like an opportunity to carefully review this himself this evening while he's at West Street.

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2 THE COURT: All right. I certainly wouldn't deprive
3 him of that opportunity. I will take that order for light evening
4 reading with me as well as the file you gave me. And if there
5 is no reason not to do so, I will sign it in the morning.

6 MR. STONE: I can make mention of this: I have
7 reviewed some of the contempt cases between yesterday and today
8 and it's my understanding that the reason civil contempt is
9 imposed during the course of the proceedings is not only to
10 punish someone who may be out on bail, but to allow someone
11 in the course of being cited for civil contempt to change their
12 mind during the course of the proceeding.

13 For example, if Mr. Morris were cited for civil con-
14 tempt and he still changes his mind, while the change could not
15 be of a loss to the Government, then criminal contempts should
16 not attach. However, if he changes his mind when the issue
17 becomes moot, then criminal contempt would attach.

18 THE COURT: But I have rarely heard anything less
19 meaningful to busy men like you than the question whether I
20 should now have him stand up you're now in civil contempt, so
21 neither both of you have to stay in jail. What are we going
22 to accomplish? I have made clear on this record that it's my
23 purpose to see to it that he is not prosecuted for this crimi-
24 nal contempt if, while there is still time--or not punished
25 for this criminal contempt, if while there is still time he does

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2 whatever he has to do. However, it should be made clear
3 he will probably be tried for this criminal contempt before
4 another judge because I will not have time to try it.

5 If he goes to trial before Judge X in the next week
6 or so and he is convicted, as one might imagine is possible,
7 and the other judge in his wisdom concludes that for him to
8 have put the court to this burden on the basis of an utterly
9 unjustifiable defiance, requires substantial punishment, there
10 won't be anything I can do about it.

11 So the time for him to think this over has already
12 largely passed. Whether we call it civil contempt or fatherly
13 advice or whatever, it seems to me our record shows amply that
14 I have given Mr. Morris a lot of time to change his mind about
15 his decision that he can just tell the Court he is not going
16 to obey the order made three or four times in this case.

17 I am giving him overnight now. Then if this notice
18 is in proper form I'm going to sign it and start the machinery
19 for his prosecution for criminal contempt, hopefully before
20 another judge. Then he has to confront that and deal with that
21 the best way he can.

22 It ought to be more clear than I like to make things,
23 that my preference would be for him to come in tomorrow and
24 write his name for the Government and whatever else they have
25 a right to ask him to do. But I have given that and Mr. Morris

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more time than a man in this situation normally gets or
deserves and that's where we stand.

Okay, 10:00 a.m.

MR. SLOTNICK: Your Honor, I have gotten back the
original affidavits and I was wondering why. I thought they
were on file with the court.

THE COURT: Yes, the clerk will see they are filed
as part of the record in this case.

MR. SLOTNICK: As a part of personal parent figure's
privilege, may we start at 10:30 tomorrow?

THE COURT: That's putting me in a ringer.

Gentlemen, the starting time is 10:30 tomorrow, not
10:00 a.m.

xxx

(Government's Exhibit 4, marked for identification.)

(Adjourned to September 21, 1973 at 10:30 a.m.)

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2 UNITED STATES OF AMERICA

3 vs.

4 JOHN CAPRA, et al

6 New York, September 21, 1973

7 10:30 a.m.

8 THE COURT: I want to take up briefly
9 first this folder of papers marked Exhibit 4 for identifi-
10 cation, which I have been reluctantly forced to go
11 through, as I see my obligations in this case.

12 I want to ask government counsel a question or
13 two about this folder.

14 It appears to me to be the work primarily
15 and fundamentally and substantially of Detective Eaton.
16 Is that right?

17 MR. FEFFER: That's my understanding, your
18 Honor.

19 THE COURT: The question or questions about
20 this file came up yesterday in connection with Lieutenant
21 Hill. I am reasonably clear that there is no adequate
22 reason to require the delivery of this file or anything
23 in it to defense counsel for purposes of extending still
24 further the cross examination of Lieutenant Hill because
25 I think the relationship of these papers to him or of

1 rda2

2 him to them is, at most, attenuated, and that the
3 business of dragging him through these papers would not
4 produce any useful information either for the defendants
5 or the court.

6 I am fully aware what is needed for cross
7 examination is normally a question for the lawyer rather
8 than a judge, but on a subject like this, where I am
9 pressing to make the government give disclosures which
10 are not clearly required, I think I have to make some
11 sort of preliminary judgment as to the conceivable
12 utility of these disclosures.

13 As to Lieutenant Hill, that's where I come
14 out.

15 However, I have a different view, or a pos-
16 sibly different view, and this is slightly anticipatory,
17 as to what the case may be when we get to Detective
18 Eaton. I gather we are all perfectly clear that he is
19 going to be among the witnesses in this minimization
20 hearing, is that correct?

21 MR. FELD: That is correct, your Honor.

22 THE COURT: Without wanting to redo the
23 same work, I note going through these papers that they
24 are liable to be of greater interest when Detective Eaton
25 has been on the stand and are arguably more pertinent

1 to the cross examination needs of defense counsel with
2 respect to him.
3

4 Now, I don't know where the procedural rules
5 for such a subject are written, I haven't seen them, but
6 I have proceeded as follows: I have paper clips on a
7 number of places, a number of pages, of this Exhibit 4
8 for identification, and my preference would be, if the
9 government found it suitable, simply to reproduce and
10 deliver to defense counsel by Monday morning those pages.

11 I am cognizant at the same time that there
12 may be legitimate claims to confidentiality on each or many
13 of these pages; there is material that doesn't relate, as
14 near as I can see, to anything of concern in this case;
15 at least at this time. Certainly anything that has
16 any remote bearing on our minimization problem that we
17 are trying to study. And it is possible that the govern-
18 ment will claim that disclosing those xtraneous mater-
19 ials will entrench on security or police interests and I
20 am obliged to care about.

21 So one way that occurs to me to proceed is
22 simply to go ahead right here in open court with Mr.
23 Peffer and Mr. Feld, in the presence of everybody, go
24 through these pages one by one and get government counsel
25 to either agree to reproduce the page or to request

rda4

on the spot the privilege of redacting that page, in Learned Hand's word -- that is, blocking out the portions that the defendants are not entitled to have -- and I will either grant or deny that application with respect to each one and will make a note on each one, and I will rely on government counsel then faithfully to follow these instructions.

I might say that as I went through, having heard more than I was interested in hearing about when who found out that who was Beansie and matters of that kind, I noted that the first reference to Stephen Dellacava, and then parenthetically a reference to Beansie I found in the file, was dated December 23, 1971, which may be consistent with what the witness was saying about when that link-up was made.

On the other hand, there are a number of papers in here as to which I, as a stranger, have no clear sense of chronology, and I can see if I were a defense lawyer I would certainly want to cross examine about them and about what various items of knowledge about various people were acquired.

So I have gone through this in an effort to look at it from both points of view, the needs of cross examination and the needs of protecting police information

1 rda5

2 that has no relevance, and I have come out where I
3 have come out.

4 Now, before I invite either Mr. Feld or Mr.
5 Feffer to come here and proceed through this perhaps
6 not standard course that I have outlined, are there
7 any objections to it? If so, I will hear them.

8 Well, I don't hear any. I take it everybody
9 has heard me so I think I just want to go ahead with
10 one of you and show you the pages -- what I will really
11 show you is the parts of pages that it seems to me the
12 defendants are entitled to have; then you can tell me in
13 each instance whether you want to block out all the
14 other portions, with the understanding that the defend-
15 ants and their lawyers will be given a description
16 of what the whole page looks like in order to make things
17 intelligible where necessary, and then I will make a
18 judgment as to whether you should block out other things.

19 For instance, I am going to allow you to block
20 out, if you want to, if you want to bother with it,
21 sheets where there are 30 names, of which 29 just simply
22 have never appeared in any connection with this case, and
23 one is Dellacava, provided you say what the list is, and
24 so on.

25 So you want to come ahead and do that, which-

1 rda6

2 ever of you is expert, or both of you. If you are
3 both here it will look less ex parte because there are
4 two lawyers.

5 Now, - I will, in spite of the unorthodoxy, re-
6 cite when I think it is fair, appropriate, helpful, what
7 we are talking about and what we are doing.

8 The first four legal size pages are sort of
9 lists of people, addresses, and so on. The fourth of these
10 pages has three references that I have marked here with
11 paper clips. They seem to me to be of possible inter-
12 est in this case. I had better say four. I see one
13 that I have missed. Make it five because Mr. Feffer
14 has added another one.

15 Let me ask you: give them the whole page,
16 or is there any reason why you give only part?

17 MR. FEFFER: I'd prefer to give only
18 the names that were directly involved or who were mentioned
19 in the affidavits.

20 THE COURT: I'll ask one of you to take notes.

21 So as to the first page containing clips, only.
22 the clipped portions are required to be given. And the
23 way we will work it, the government will have in court,
24 available to me, the full page and counsel and I will also
25 have the partial page with the things blocked out.

1 rda7
2 If it is necessary for me to make comparisons, that will
3 be feasible right on the spot.

4 Then I have a report from Lieutenant Hill to
5 Commanding Officer, Narcotics Division, two pages, and Mr.
6 Feffer has indicated that the whole thing will be made
7 available.

8 Is that right?

9 MR. FEFFER: That is correct.

10 THE COURT: I have another report dated
11 February 4, 1972, and I think that might just as well
12 be made available. I'm not sure how useful it is. On
13 the other hand, I don't think it will hurt the govern-
14 ment.

15 MR. FEFFER: No problem.

16 MR. FELD: No problem.

17 THE COURT: Then that will be supplied.

18 Now, I have a page which has the name Stephen
19 Dellacava, also known as Beansie. I think at least
20 some of that page ought to be given; perhaps all.

21 MR. FELD: The whole page?

22 THE COURT: Again, if you want to give
23 less than all, I will allow you to make deletions.
24 For example, I am pointing here to a name that is relevant.
25 I think you should give that.

1 rda8

2 This seems to be a page of geneologies, as far
3 as I can see. Is that right?

4 MR. FEFFER: That is correct, your Honor.

5 Personally I don't see the relationship of
6 this type of chart to the relevancy of this hearing.
7 This is an officer's conception of what the organization
8 looks like.

9 THE COURT: Well, I can see how a defense
10 lawyer might see some possible relationship and might
11 want to ask questions about it. Unless there is some
12 reason that the whole page should not be given, I'd be
13 inclined to give the whole page. But if you want to
14 argue for something less, I'll hear you now.

15 Let's leave it this way: the page that we
16 are now on -- and maybe I will make this a general
17 ruling, sort of feeling my way -- should be given as
18 nearly in full as possible. I will let you make dele-
19 tions subject to my rulings. And when I see the deleted
20 page, if defense lawyers are upset by the deletions or they
21 want me to take another look, I will take another look.

22 MR. FEFFER: We might save time that way.

23 THE COURT: I think we ought to do this
24 with the next page. As a matter of fact, I have now
25 reached what I think is a way of ending this type of

1 rda9

2 peculiar procedure: let's do that with the whole busi-
3 ness.

4 MR. FEFFER: Fine, your Honor.

5 THE COURT: Wherever I have a clip, prima
6 facie the government will give the whole page. If less
7 than the whole page is given, I will compare the complete
8 page with the partial page and I will make a judgment,
9 subject to whatever help defense counsel can give me, as
10 to whether more needs to be given.

11 I guess I'd do better to ask you over the
12 weekend so I can look at it Monday and have an initial use,
13 yes?

14 MR. FEFFER: Yes.

15 MR. FELD: Yes.

16 THE COURT: I'm glad we found a way to end
17 that.

18 Now, before we proceed with the next witness
19 in our minimization hearing, I have this order to show
20 cause that I understand has been considered by Mr. Stone
21 with government counsel. And on Mr. Stone's request we
22 postponed from last night to this morning the actual
23 signing of this to see whether finally it was absolutely
24 necessary.

25 Mr. Stone, please.

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2 MR. STONE: I will ask Mr. Morris once again
3 if there has been a change of heart.

4 DEFENDANT MORRIS: May I address you, your
5 Honor?

6 THE COURT: Yes.

7 DEFENDANT MORRIS: Your Honor, I don't know
8 anything about the law. All I know is I got 20 years
9 for the same evidence that I'm facing 30 years here for.
10 I'm just tired of doing time and I don't understand.

11 THE COURT: Look, I know Mr. Stone very well.
12 If I felt you had a dumb lawyer or somebody who didn't
13 explain things to you, I would take even more time with
14 you than I'm going to take or have taken. But that
15 is not the situation. You got a faithful lawyer who
16 fights sometimes harder than I find comfortable, and
17 that's his job. He has told you where you stand and
18 I have told you where you stand. We are not trying
19 your case yet, though, believe it or not, I'm attempting
20 to get to that point.

21 The only thing that has happened is that for
22 reasons that I don't really have any knowledge about you
23 have been ordered to write your name. Well, lots
24 have people come through here and they are ordered to
25 write their name. That may hurt you in the sense that

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2 when you write your name they may use it against some-
3 body. They want it for evidence.

4 Now, the question of whether you can be forced
5 to do that has been decided, as I understand it, by the
6 Supreme Court of the United States, or under decisions
7 of the Supreme Court, it seems perfectly clear to me,
8 and I believe to every lawyer in this room, although I am
9 not sure, that you have to do that when you are asked to
10 do it in a case where your handwriting may have something
11 to do with the case. And I don't have, even if I
12 wanted to, any choice about that. When the government
13 asks that you be made to write your name, I have to
14 order you to do that. Then if you don't obey, I have
15 to start the machinery going to have you held in con-
16 tempt.

17 Now, I have tried to tell you every which way --
18 I don't know what is going to happen to you in the Ohio
19 narcotics case and I don't know what is going to happen
20 to you here in this case. That's separate from what
21 we have been talking about. But in this case, if you
22 are going to insist on saying the hell with you, Judge,
23 you have the clearest kind of assurance that you are going
24 to be punished for that and you are not going to be
25 able to avoid that.

1 rdal2

2 So I have urged you and advised you and
3 ordered you to listen, because if some judge of this
4 court sentences you to a couple of years for this contempt,
5 as he might, you are not going to be able to beat that
6 rap no matter what happens on the narcotics, so I think
7 you are being foolish. I don't really know what else
8 to say to you and I really must not take the time of
9 lots of other people whose cases are here and elsewhere
10 to keep going back and forth with you on it.

11 Now, all your other things are separate.
12 You may or may not have other rights. As this case
13 goes on and as you raise through your lawyer each of these
14 arguments, I will consider them.

15 Now, I have a motion before me that Mr. Stone
16 made, partly because you urged him to, partly because
17 he may believe in it, and I will tell you now, so you
18 understand that I don't mean to be kidding around with
19 you, that I am going to deny now almost all of that
20 motion. The only part of it I am going to leave open
21 today is your right to subpoena witnesses if and when par-
22 ticular witnesses should, in fairness, be brought here to
23 help you defend yourself. But as to the motion to
24 suppress evidence, and so on, I am perfectly clear by my
25 lights that there is no basis for that in the law.

Now, all other questions, like should you get 20 years in Ohio and another 30 here for the same deal, are way down the road and I can't talk to you about them now. If you were to be convicted here, I can only say that most judges would not be disposed to give you another 30 on top of 20 for what amounts to the same thing, if that is the situation. But I don't know anything about that.

Now, you follow everything I have said?

DEFENDANT MORRIS: I understand. I would like for you not to take the position that I am saying to help with the judge.

THE COURT: You know why I said that, and I am perfectly willing to take it back, because I don't usually talk that way, except at home. I said it really in an effort to be helpful to you, believe it or not, because in the eyes of the law that's what you are saying. And when you have that kind of confrontation, at least as things stand, you are there and I am here, you have to lose is the way it comes out.

I am trying to make that perfectly clear to you in an effort to explain to you that you are just going down a wrong road and you are making a mistake, but it is a very unequal contest when it is put like that. You understand?

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MR. MORRIS: I understand.

THE COURT: I don't mean to convey to you that you are being in a personal way disrespectful or unpleasant. That would be a wholly different subject. I mean you are simply choosing to defy an order of the Court which you probably are not going to get reversed or changed. So I think you ought to obey it.

MR. MORRIS: Your Honor, as you state, perhaps I am wrong but I just feel unprotected in the situation. That's all I want you to understand.

THE COURT: I understand it. Unprotected is not the word I used. He is supposed to protect it and, believe it or not, I'm supposed to protect you. And if I thought you didn't have any right not to write your name it would be my job to see that that right was supported, that you had the benefit of it. But you don't have any such right.

I just think I have to try to make you sign the thing. Of course, I can't, nobody can make you write your name, but they can instead punish you for not doing it. That's where you are at.

Let me just ask you, because I can't go on keeping this whole thing waiting, do you want to do it or do you want to go ahead with the contempt business?

2 MR. MORRIS: I think we'll proceed with the
3 contempt.

4 THE COURT: Okay. Is there anything
5 about this order, Mr. Stone?

6 MR. STONE: No, I think it correctly recites
7 the facts that have transpired, your Honor.

8 THE COURT: When should I make it returnable?

9 MR. FELD: The rules require a reasonable
10 time for the defendant to prepare his defense. I would
11 think a week would be sufficient, more than a reasonable
12 time.

13 THE COURT: Does that make sense to you, Mr.
14 Stone?

15 MR. STONE: It does, your Honor, except
16 next Friday the Court may not be in session so I suggest
17 the Monday following.

18 THE COURT: All right, today is the 21st, the
19 28th, what are we talking about, October 1?

20 MR. STONE: October 1, your Honor.

21 THE COURT: Mr. Stone, I have also endorsed
22 a denial on your motion filed yesterday with the
23 reservation I mentioned in talking to Mr. Morris, that
24 if and when you have a right to subpoenas, nothing I
25 have written here is meant to limit that right.

1 3rdr 16

2 MR. STONE: Thank you, your Honor.

3 MR. FELD: Your Honor, there is one small
4 matter here. We thought it was going to be served
5 yesterday. I wonder if service 5 o'clock today will be
6 all right.

7 THE COURT: You can serve it now if you
8 wish.

9 Are we ready to proceed with our hearing?

10 MR. MC ALEVY: If I may just address the
11 Court on one matter, please.

12 THE COURT: Yes.

13 MR. MC ALEVY: In my motion papers, your
14 Honor, I moved that any evidence that was gained as a
15 result of the arrest made on Mr. Guarino and Mr. Della Cava
16 on February 3 should be suppressed. And yesterday for
17 the first time I understood that the government is going to
18 seek to use these monies that were found up at Rockefeller
19 Center on February 3. I want to remind the Court I
20 still have that motion pending. After conferring with Mr.
21 Feitell today he, as I was, unaware of the fact the
22 government was going to use the money. I did it as a
23 cautionary measure and Mr. Feitell said he would like to
24 join with me in that motion.

25 MR. FEITELL: I also say that my standing with

1 4rdr 17

2 respect to this point was raised in my moving papers of
3 September 5 filed with the Court. I never received
4 any answer to the conspiracy specifically recited
5 proposition that the government was perhaps entertaining
6 an idea of using this. So that they can't complain now
7 that they haven't been alerted.

8 MR. MC ALEVY: I may say, your Honor, there
9 is no reply with my motion in the government's brief
10 either.

11 THE COURT: Well, Mr. Feld, if I remember
12 correctly, said the government consents to an evidentiary
13 hearing on that motion to suppress. Is that right?

14 MR. FEFFER: Mr. Feld and I myself con-
15 ferred about this yesterday afternoon, and you asked us
16 to come back with a position, it's our position now that
17 although there was a motion made on the 5th of September
18 with respect to suppressing evidence gained as a result
19 of the illegal wiretapping, they did make reference to certain
20 monies, Mr. Feitell did, there was no motion to suppress
21 on the basis of any type of illegal search.

22 The government does concede that should your
23 Honor suppress the wiretap in question, the Diane's Bar
24 wiretap, in that case the government would not offer
25 the monies found as a direct result of conversations on

1 5rdr 18

2 that wiretap.

3 However, should the wiretap evidence be
4 admitted in evidence, on that basis the government would
5 intend to offer monies and other evidence found as a
6 result thereof. It's our contention that no motion has
7 been made to suppress monies or anything else resulting
8 from a search that the defendants have known about for
9 two years, that Mr. Feitell knew about and mentioned in
10 his papers on the 5th.

11 Certainly, Mr. Feitell had to at least have
12 in his mind that the government was going to offer this
13 material because he moved to suppress it on the basis
14 of the illegal wiretaps.

15 THE COURT: Where did you move to suppress it
16 o n the basis of the illegality of the arrest apart from
17 the wiretaps?

18 MR. FEITELL: I think the two motions run
19 together, unless your Honor wants to take the position that--

20 THE COURT: No. I want to know if they
21 took \$15,000 of your client's in February of '72 and
22 they were holding it, presumably he and you would have
23 an interest in getting it back or in suppressing it for
24 use as evidence long since. And the question is when,
25 if ever, I'm going to cut off the time for making

1 6rdr 19

2 motions.

3 If you knew about this \$15,000, you obviously
4 knew when and the circumstances it was taken. If you move
5 to suppress it because it resulted in an unminimized wire-
6 tap, you are certainly getting a hearing on that. If you
7 win that motion, fine.

8 But now Mr. Feffer says, and I believe with
9 some cogency, if you lose that motion I shouldn't let you
10 make a different motion which says apart from the minimiza-
11 tion which I moved about, I now claim the arrest was
12 illegal and you should suppress it for that reason.

13 Now, I will rule. If Mr. Feffer has correctly
14 stated the situation, I will not allow you to make a new
15 motion based on the arrest nor will I expand your motion
16 by construction to embrace the arrest unless you now show
17 me, as I invited you to do, that the motion as you make it
18 fairly incorporates an attack on the arrest, apart from
19 your attack on the validity of the wiretapping.

20 MR. FEITELL: First of all, if one of the
21 premises which your Honor urges that I as counsel for
22 Della Cava in connection with this case, was under an
23 obligation in connection with a New York State arrest to
24 make an application in another court for the return of
25 certain property --

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2 THE COURT: That's not one of my premises.
3 I'm talking about what you had to do here, the motions
4 you had to make here.

5 MR. FEITELL: Judge, I think, if you want
6 to approach this technically, that's all right with me.
7 I'll test it elsewhere. But within the four corners
8 of my paper the government was clearly alerted that this
9 was an issue in the case.

10 THE COURT: Show me where in your papers they
11 are alerted. That's what I'm asking you to do instead
12 of orating. Get your motion paper and show me where the
13 government and, incidentally, the judge were put on notice
14 that this was an issue posed. If you show me then you
15 win.

16 MR. FEITELL: Page 7 of my affidavit, under
17 the caption "March 8, 1972, wiretap Ray's Stationery Store.
18 Significantly the state authorities could not proceed
19 with the prosecution of this case owing to the utter
20 paucity of proof."

21 That is my contention. That goes as to
22 probable cause underlying the arrest. Your Honor may not
23 read it that way. That's what I think it portends.

24 THE COURT: I don't read it that way. I
25 will deny --

2 MR. FEYTELL: That isn't all I rely on, Judge.
3 If you continue to read on. I said that the government
4 quite possibly would intend to use that evidence and would
5 offer it on this trial.

6 THE COURT: And the next sentence.

7 MR. FEITELL: I say it was derived entirely
8 through the two invalid wiretaps.

9 THE COURT: You say "Our contention on this
10 score is, of course, that such evidence would be
11 inadmissible, having been derived directly through the
12 two invalid wiretaps.

13 Now, I read that to mean that your attack is
14 on the validity of the wiretaps and not anything else.
15 And there is nothing in there to alert me this month,
16 leave aside the fact that this happened a year and a half
17 ago, to the fact that you wanted in this long pretrial
18 period a hearing on the validity of that state of arrest.
19 But go ahead.

20 MR. FEITELL: I think there was enough
21 before the Court at that time and enough before the
22 prosecutors here to earn a response at least from them
23 as to whether or not they intend to utilize this material.
24 If they said they weren't and I knew then what I know
25 now and learned yesterday for the first time, when quite

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2 irrelevantly they injected the Jack Brown matter into the
3 proceedings, I would have made the applications.

4 Now, your Honor has entertained an application
5 from Mr. Morris in connection with suppression. You
6 denied it. He made the motion yesterday or the day
7 before orally. I don't know if it was made on paper or
8 not.

9 THE COURT: What does that have to do with
10 this?

11 MR. FEITELL: It seems I'm in a better
12 position because I pointed to the issue. Mr. McAlevy
13 hit it squarely, and if your Honor is going to grant a
14 suppression hearing with respect to Mr. Guarino, I don't
15 see why it shouldn't be granted to Mr. Della Cava.

16 THE COURT: I'm working backwards. I'm not
17 sure I should grant it with respect to Mr. Guarino either
18 at this late time. In fact, I'm not sure how realistic
19 this whole conversation is. If the wiretaps are upheld
20 I gather there will be evidence from them that goes far
21 to justify this arrest. If they are knocked out, then
22 you will get everything suppressed. So I am not sure
23 what we are talking about, but I have concluded that I
24 will not allow us, in the course of conversation and
25 cross-examination and just kind of casual chit chat to

1 10rdr 23

2 increase the bulk of the pile of motions that I have
3 already undertaken to hear before we can begin to try this
4 case. I just have to cut it off somewhere. If necessary,
5 if anybody is convicted I'll have another look post-trial,
6 but I'm just not going to spend the whole autumn adding
7 onto the pretrial motions that require evidentiary
8 hearings based on the obviously fertile and energetic
9 machination of counsel in this case.

10 MR. FEITELL: There is another feature of
11 this, Judge, relating to the face of the indictment it-
12 self. There is an account in the indictment relating to the
13 passage of monies in connection with the narcotics trans-
14 action on February 3, nor is there an overt act even
15 coming close to that date, February 3, relating to
16 Guarino, Della Cava, and Jack Brown.

17 Now, I say that the way the indictment was
18 framed and the failure of the prosecutor to answer
19 what I raised in the papers, certainly put me off tomorrow.

20 THE COURT: You said in your papers in
21 clear English quite possibly the government is going to
22 use this. You are a good enough defense lawyer to know
23 that anything the government quite possibly may be planning
24 to use, which is physical evidence, that you have some
25 argument for suppressing, you ought to argue for the

1 rdr24

2 suppression of. And you proceeded to do exactly that on
3 the wiretap point.

4 Now, I'm just not going to let you add new
5 points that call for two-day evidentiary hearings
6 on the kind of submission you are making, as much as I
7 appreciate the ingenuity of the submission. Your applica-
8 tion is denied.

9 Mr. McAlevy, why should I do differently with
10 respect to Mr. Guarino? Can you remind me first, because
11 my notes have it somewhere but I'm not sure, who was arrested
12 on that occasion, was it both Mr. Guarino and Mr. Della
13 Cava?

14 MR. MC ALEVY: Yes, your Honor.

15 THE COURT: At that same place?

16 MR. MC ALEVY: Yes, sir.

17 THE COURT: At that same time?

18 MR. MC ALEVY: Yes.

19 THE COURT: In whose car was it?

20 MR. FEITELL: With all due respect to Mr.
21 Fishman, who is going to be a witness here, now we seem to be
22 getting involved in material that is related to him.

23 MR. FEFFER: I'll ask Mr. Fishman to wait
24 outside.

25 MR. FISHMAN: I'll be glad to.

1 rdr25

2 (Mr. Fishman leaves the courtroom)

3 THE COURT: All right.

4 MR. MC ALEVY: I believe it was Mr. Della
5 Cava who was the driver of the vehicle, your Honor, and
6 my client was never in the car, was outside having a
7 conversation with him when he was arrested by the --

8 THE COURT: I asked you whose car it was.

9 MR. MC ALEVY: I thought I'd tell you a little
10 more. I don't know whose car it was.

11 THE COURT: If you don't know the answer
12 to the question I ask, don't answer the question. That's
13 much more helpful than telling me a lot of other stuff
14 you do know.

15 Whose car was it, do you know, Mr. Feitell?

16 MR. FEITELL: I think it was Mr. Della Cava's,
17 your Honor.

18 THE COURT: Okay.

19 Mr. Feffer, I take it your argument about the
20 tardiness of this particular motion to suppress extends to
21 both Mr. Della Cava and Mr. Guarino.

22 MR. FEFFER: That is right. Mr. Guarino
23 has no standing.

24 MR. MC ALEVY: I don't understand about this
25 tardiness.

1 rdr26

2 THE COURT: I don't care what you understand.

3 What is Mr. Guarino's standing to suppress
4 this money? Was it his car?

5 MR. MC ALEVY: He was arrested and money
6 taken from his person.

7 MR. FEEFFER: The government will produce what
8 was taken from the trunk of the car. If money was taken
9 from Mr. Guarino I am not aware of it and the government
10 wouldn't introduce it.

11 THE COURT: What is your standing of your
12 client if the money was taken from the car and not from his
13 person? I'm asking you what is your standing in moving
14 to suppress it?

15 MR. MC ALEVY: I'm moving to suppress the
16 money taken from my client.

17 THE COURT: Listen, the government told you
18 they don't plan to introduce any money taken from the
19 person of your client.

20 MR. MC ALEVY: You leave me in a difficult
21 position because if the government seeks to use this money
22 against Mr. Guarino at trial, certainly I should have the
23 right to suppress this money. If the government is going
24 to say that money belonged to Della Cava and Guarino,
25 then I would have a right to go after it. If they

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2 search an office in the Empire State Building and they.
3 find some money that they want to use against me, I can't
4 move to suppress it because I don't even own that office
5 or have any possessory interest in it.

6 THE COURT: I now understand your position.
7 Is this motion in writing?

8 MR. MC ALEVY: Yes, sir. I filed it,
9 never received a reply.

10 THE COURT: You may assume it will be denied.
11 Call the next witness.

12 MR. FEFFER: The government calls Mr. Fishman,
13 your Honor.
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